Petition

81-1928

No.

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

FIDELITY TELEVISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, RKO GENERAL, INC., COMMUNITY BROADCASTING OF BOSTON, INC., NEW ENGLAND TELEVISION CORPORATION, THE DUDLEY STATION CORPORATION, AND MULTI-STATE COMMUNICATIONS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 19, 1982

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QUESTION PRESENTED

Whether a reviewing court improperly intrudes into an administrative agency's procedural discretion, contrary to *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978), when it sets aside the agency's decision on a procedural ground that nullifies the intended scope and effect of a procedural choice made by the agency in a concededly proper exercise of its docket management discretion.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Fidelity Television, Inc.* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 4, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The decision and orders of the Federal Communications Commission are reported as *RKO General, Inc. (WNAC-TV)*, 78 F.C.C. 2d 1 (1980), *RKO General, Inc. (KHJ-TV)*, 78 F.C.C. 2d 355 (1980), and *RKO General, Inc. (WOR-TV)*, 78 F.C.C. 2d 357 (1980) (Appendix B).

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*Fidelity Television, Inc. has no parent, subsidiary, or affiliated companies.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 4, 1981 (Appendix C). Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on January 18, 1982 (Appendix D).[1] The jurisdiction of this Court is invoked under 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 47:

§ 154. *Federal Communications Commission*

. . . .

(j) *Conduct of proceedings; hearings*

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . .

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[1] RKO General, Inc. petitioned for certiorari on February 17, 1982, addressing RKO's disqualification as a television licensee in Boston. The instant petition presents a fundamentally different question that relates solely to the Los Angeles aspect of the case.

STATEMENT OF THE CASE

RKO General, Inc. (hereinafter "RKO") is the licensee, *inter alia,* of television stations in Los Angeles (KHJ-TV), Boston (WNAC-TV), and New York (WOR-TV).

In 1965, petitioner Fidelity Television, Inc. ("Fidelity") challenged RKO's license renewal for KHJ-TV, Los Angeles, by filing with the Federal Communications Commission ("FCC") a competing application for the license. The FCC designated the mutually exclusive applications of Fidelity and RKO for hearing to determine which should be granted. Following an evidentiary hearing, which included a character issue against RKO for alleged anticompetitive practices, the Hearing Examiner rendered an Initial Decision in August 1969 finding that RKO had "miserably failed to serve the public interest" in its operation of KHJ-TV,[2] denying RKO's license renewal application, and granting Fidelity's application.

Meanwhile, a similar challenge to RKO's license renewal for WNAC-TV, Boston, had begun in 1969 when two groups filed competing applications for that license. In 1971, while the Boston hearing was in progress and the Los Angeles Initial Decision was awaiting review by the full FCC, the Broadcast Bureau of the FCC asked the FCC to reopen the Los Angeles hearing for two purposes: (a) to consider new evidence being developed in Boston concerning RKO anticompetitive practices, and (b) to add a further character issue against RKO to determine whether its officials had testified untruthfully in the Los Angeles hearing.

Since these questions were relevant to RKO's qualifications in both Los Angeles and Boston, the FCC was faced with a procedural decision – how best to hear the new character evidence for Los Angeles purposes without delaying review of the Initial Decision in which RKO had already lost its Los Angeles license on other grounds. The FCC decided that, rather than reopen the hearing in Los Angeles, the "more expedient procedure" was to try these issues in Boston, make Fidelity a party to the Boston proceeding for that purpose, and if the FCC reversed the Los Angeles Initial Decision that had favored Fidelity over RKO, defer final decision in Los Angeles until completion of the Boston case, then decide Los Angeles "in light of the evidence introduced in, and the outcome of, the Boston proceeding."[3] Making clear its intent to encompass RKO's Los Angeles license within the scope of the Boston hearing, the Commission simultaneously changed the character issue from whether RKO was qualified to be simply "licensee of WNAC-TV [Boston]" to whether RKO was qualified to be "a licensee of the Commission."[4] With that, Fidelity was made a party in Boston,[5] and the hearing continued in that docket.

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[2] *RKO General, Inc. (KHJ-TV),* 44 F.C.C. 2d 149, 225 (Initial Decision 1969).

While the Boston hearing was still in progress, the FCC in December 1973 reversed the Los Angeles Initial Decision, holding that although RKO and Fidelity were equal on comparative grounds, RKO was entitled to prevail because an incumbent licensee's renewal "rights and expectancies" must be recognized.[6] However, because the character issues against RKO had not yet been resolved in the Boston proceeding, the FCC merely declared RKO's

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[3] *RKO General, Inc. (KHJ-TV and WNAC-TV)*, 31 F.C.C. 2d 70, 74 (1971).

[4] *Id.* at 75.

[5] *Id.*

[6] *RKO General, Inc. (KHJ-TV)*, 44 F.C.C. 2d 123, 137 (1973).

Los Angeles renewal "deemed" to be granted and Fidelity's application "deemed" to be denied, "subject to whatever action may be deemed appropriate following resolution of the matters in [Boston]."[7] The court of appeals affirmed that decision in 1975, but noted that its affirmance "is conditional (as was the Commission's decision) on the outcome of the [Boston] proceedings."[8]

Soon thereafter, in late 1975, one of RKO's challengers in Boston, Community Broadcasting of Boston, Inc. ("Community"), petitioned to reopen the Boston hearing and add still more character issues against RKO.[9] Community alleged that RKO's parent, the General Tire & Rubber Company ("General Tire"), had engaged in extensive criminal misconduct in its overseas operations, including bribery, tax evasion, maintenance of illegal secret accounts, defrauding of affiliates, and falsification of books and records. Confronted with these serious charges, RKO asked for additional time to consult with persons who might know the facts, then responded in January 1976 with a pleading asserting, *inter alia,* that "the charges . . . are groundless"[10] and that "there is no factual or legal foundation for this pyramid of charges."[11] RKO further labeled Community's charges as "rampant" with "sensationalism and blatant exaggeration," "wild-swinging," "unverified," "essentially unsupported," and

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[7] *Id.* at 138.

[8] *Fidelity Television, Inc. v. FCC,* 515 F.2d 684, 703 n. 45, *rehearing denied,* 515 F.2d 703 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975).

[9] An Initial Decision had been issued by the Administrative Law Judge in the Boston proceeding in 1974 and was then awaiting review by the full FCC.

[10] "Opposition of RKO General, Inc. to Petition To Reopen the Record, Enlarge the Issues and Remand for Further Hearing," January 21, 1976, p. 17.

[11] *Id.* at 5.

"totally unreliable."[12] RKO failed to disclose, however, that the Securities and Exchange Commission ("SEC") had been investigating General Tire for eight months on the very same matters.

Community's charges proved to be true. In May 1976 the SEC's investigation of General Tire ripened into a civil complaint and consent decree requiring General Tire to investigate itself and report its findings. The resulting report, which General Tire tendered in July 1977 and RKO duly filed in the Boston proceeding, confirmed by admission the truth of virtually everything Community had charged and RKO had denied. Moreover, the report showed that when RKO denied Community's charges before the FCC, several top General Tire officials, including its president and chief executive officer, *knew* that the charges were true.[13]

Reviewing this record (and the 1974 Boston Initial Decision), the FCC held oral argument in the Boston proceeding in July 1979 to consider whether RKO was qualified to be relicensed. In a comprehensive decision issued in June 1980, the FCC held on three independent grounds that RKO lacked the requisite character qualifications. One of those grounds – the only one relevant here – was that RKO had lacked candor with the FCC following Community's charges of misconduct by RKO's parent. Specifically, the FCC found that RKO had misled the FCC as to the truth of Community's allegations and had failed timely to inform the FCC of the SEC investigation concerning General Tire's misconduct at a time when that very misconduct was being called into question before the FCC. Concluding that "there can be (and is) no assurance that in the future RKO will be a dependable and trustworthy trustee of the public airwaves,"[14] the FCC denied RKO's application to renew the Boston license. Expressly declaring Fidelity to be a party in Boston for purposes of *all* pending matters bearing on RKO's character qualifications,[15] it also entered a companion order in Los Angeles, which reaffirmed the "interrelationship between the Los Angeles and Boston proceedings," concluded that the character findings in Boston compelled RKO's disqualification in Los Angeles as well, and thus denied RKO's Los Angeles renewal application (which had previously merely been "deemed" granted subject to the outcome of the Boston proceeding).[16] A similar order disqualifying RKO as licensee of WOR-TV, New York, was entered in the New York proceeding.[17].

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[12] *Id.* at 5, 7, 15, 16, 17.

[13] Appendix B at 197a-199a.

The court of appeals, while reversing two of the grounds for the FCC's action, affirmed the finding that RKO had lacked candor with the FCC following Community's charges of misconduct. However, analogizing RKO's lack of candor to a contempt of court, it ruled that this misconduct supported RKO's disqualification only in Boston, not necessarily in Los Angeles or New York, because the lack of candor occurred "directly before the trier of fact" only in the Boston proceeding.[18] Thus, while affirming RKO's disqualification in Boston, the court remanded the Los Angeles and New York decisions for further consideration of whether RKO should be disqualified there as well.

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[14] *Id.* at 53a.

[15] *Id.* at 82a-83a.

[16] *Id.* at 277a.

[17] The New York proceeding had begun in 1972 when a challenger, Multi-State Communications, Inc., filed a competing application for RKO's WOR-TV. In 1974 the Commission had ordered that resolution of the character issues against RKO in Boston would be *res judicata* as to RKO in New York. *See RKO General, Inc. (WOR-TV),* 46 F.C.C. 2d 246 (1974).

[18] Appendix A at 42a.

This petition is directed solely to the court's failure to affirm RKO's disqualification in Los Angeles.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION REFLECTS A CONTINUING MISAPPREHENSION OF THIS COURT'S ADMONITION THAT REVIEWING COURTS MAY NOT INTRUDE UPON AN AGENCY'S PROCEDURAL DISCRETION

In 1978 this Court found that the Court of Appeals for the District of Columbia Circuit had "seriously misread or misapplied" a long line of statutory and decisional law cautioning reviewing courts against imposing their own notions of proper procedures on administrative agencies. *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 525 (1978). Plainly impatient with that court's unjustified intrusion into agency proceedings, it pointed out that "this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Id.* at 524. Specifically, *Vermont Yankee* held that a reviewing court could not require an agency to employ procedures beyond those called for by statute.

The decision below represents, in a different but equally improper form, the very practice that the Court in *Vermont Yankee* meant to stop — unwarranted judicial intrusion into an agency's manner of proceeding. If *Vermont Yankee* bars reviewing courts from *directly* invading agency procedural discretion, this case presents the question whether reviewing courts may do the same thing *indirectly*. Unless this Court makes clear that they may not, the *Vermont Yankee* admonition will be of dubious effect.

In the instant case, the court of appeals grossly interfered with the FCC's manner of proceeding by effectively nullifying the FCC's 1971 procedural order meshing the Los Angeles and Boston proceedings. The court did this by refusing to affirm RKO's disqualification in Los Angeles on the inventive reasoning that RKO's lack of candor occurred only in the Boston docket. In creating that artificial distinction between the Boston and Los Angeles proceedings, the court thwarted the administrative purpose of the FCC's order linking the two proceedings in 1971.

The plain intent of the 1971 order was to provide a common trial of character issues that were equally relevant to Los Angeles and Boston. Various procedural alternatives were available: (1) reopen the Los Angeles hearing and try the issues there, with the findings *res judicata* for Boston; (2) reopen the Los Angeles hearing, consolidate it with the Boston hearing, and try the issues in a joint proceeding; (3) reopen the Los Angeles hearing and try the same issues in separate Los Angeles *and* Boston proceedings; or (4) try the issues in the Boston hearing (adding Fidelity as a party for that purpose), and condition the final Los Angeles decision on the outcome thereof. Deeming the last course to be the most administratively efficient (because it would avoid redundant hearings and would permit review of the Los Angeles Initial Decision without delay), the FCC chose to try the common character issues in the still ongoing Boston hearing.

The FCC never intended this procedural decision to have any bearing on the ultimate *substantive* resolution of

RKO's character qualifications. That is, it did not intend the substantive outcome of the case to vary depending on which procedural alternative was chosen for trying the common issues. The 1971 order was purely a docket management decision based solely on procedural considerations. Contrary to the court of appeals' view, the obvious intent of that order was to make the Boston trier of fact the Los Angeles trier of fact as well on the common issues. The findings on those issues were to be dispositive in Boston *and* Los Angeles. All the Los Angeles parties were made parties in Boston for those issues. The issues were carefully worded to encompass the Los Angeles license as well as the Boston license. And the order contemplated no further evidentiary proceedings on those issues in Los Angeles. In short, the FCC converted the Boston proceeding into a phase of the Los Angeles proceeding as well.[19]

The court of appeals has now completely overridden that procedural action. It has set aside the FCC's disqualification of RKO in Los Angeles essentially because the FCC chose in 1971 – for perfectly proper reasons of administrative efficiency – to hear the evidence on RKO's general character qualifications in one docket rather than another. By so ruling, the court has visited upon the FCC's 1971 procedural order a major substantive consequence that the FCC itself certainly did not intend and could not possibly have foreseen.

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[19] For this reason, RKO's lack of candor *did* occur directly in the presence of the Los Angeles trier of fact, and RKO's disqualification in Los Angeles should thus have been affirmed on the court of appeals' own reasoning. To be sure, RKO's lack of candor was not in response to one of the Los Angeles-related issues identified in the 1971 procedural order. But neither was it in response to any of the Boston-related issues. It came in response to new charges of overseas misconduct – misconduct on its face equally relevant to RKO's qualifications in both Los Angeles and Boston but not yet designated as an issue in either. Thus, nothing about the context of RKO's lack of candor justifies any distinction between Boston and Los Angeles.

The result is utterly capricious. Had the FCC in 1971 happened to deem it more efficient to try the common issues in the Los Angeles docket instead, then the court of appeals' reasoning would now support RKO's disqualification in *Los Angeles* but not Boston. Had the FCC technically consolidated the two dockets in 1971, then disqualification in *both* Los Angeles and Boston would have been affirmed. Likewise, when the allegations of General Tire's overseas misconduct were made in the Boston docket in December 1975, Fidelity could have promptly duplicated those allegations by filing a comparable petition in the Los Angeles docket.[20] Had Fidelity done so, RKO's dissembling response in early 1976 would have been made in the Los Angeles docket as well as the Boston docket, and the rationale of the court of appeals' decision would thus require disqualification in Los Angeles as well.[21] Quite clearly, then, the court of appeals has made the substantive outcome of the case turn entirely on procedural happenstance, which was just what the FCC had *not* intended.

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[20] Although judicial review of the FCC's 1973 decision conditionally favoring RKO over Fidelity had been completed in 1975, the FCC retained jurisdiction in the Los Angeles proceeding because of the conditional nature of the 1973 decision. Thus, the FCC was empowered to reopen the Los Angeles proceeding in light of new developments if Fidelity had so requested. *W.S. Butterfield Theatres v. FCC*, 237 F.2d 552, 554-55 (D.C. Cir. 1956).

[21] The only reason Fidelity did not replicate the allegations in the Los Angeles docket, of course, was that the 1971 procedural order had made clear the FCC's intent to hear common character issues in the Boston docket and to condition the final Los Angeles decision thereon. A reopened Los Angeles proceeding, therefore, would have been redundant.

In effect, the FCC has been penalized for having made what turns out to be the "wrong" docket management choice. Although the Los Angeles case has already lasted for over sixteen years, the FCC is now commanded to conduct still *further* proceedings to decide what it has already decided, namely that RKO is unfit retain its Los Angeles license.[22] What is more, the court of appeals has imposed this burden on the FCC even though it agrees on the merits that RKO's misconduct "may well be . . . inconsistent with a licensee holding a license *anywhere*."[23]

By robbing the FCC's 1971 procedural order of its intended scope and effect, the court of appeals has all but rendered meaningless the FCC's statutory grant of broad procedural discretion. Section 4(j) of the Communications

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[22] This also does a great injustice to Fidelity, whose application, previously "deemed" denied, would now be grantable if RKO's disqualification in Los Angeles were affirmed. But for the 1971 order directing Fidelity to litigate the character issues in Boston rather than Los Angeles, Fidelity would have raised in Los Angeles the same charges that Community raised against RKO in Boston. In that event, RKO's dissembling response to those charges would have been made in the Los Angeles docket as well, with the result that RKO's disqualification in Los Angeles could not have been distinguished from its disqualification in Boston on the ground that the misconduct occurred only in the Boston proceeding. The decision thus harshly penalizes Fidelity for relying on the FCC's 1971 order and doing in good faith exactly what it was told to do — participate in Boston. It makes Fidelity the victim of a procedural choice that was intended to *benefit* Fidelity by expediting review of the Initial Decision that Fidelity had won in 1969. And it condemns Fidelity, which has already spent sixteen years litigating its application, to go back and relitigate the merits of the FCC's conclusion that RKO's lack of candor warrants disqualification in Los Angeles.

[23] Appendix A at 43a (emphasis added).

Act of 1934, as amended, 47 U.S.C. § 154(j), provides in pertinent part:

> The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

That provision empowers the FCC to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). It was just that sort of subordinate procedural question that the FCC sought to resolve by its 1971 order in the instant case, only to be stymied by judicial intervention ten years later. To permit reviewing courts to nullify such agency procedural discretion — whether directly or indirectly — would "render nugatory Congress' effort to insure that administrative procedures be designed by those most familiar with the regulatory problems involved." *FCC v. Schreiber,* 381 U.S. 279, 290 (1965).[24]

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[24] Ironically, the court of appeals cited the above-quoted authorities as supporting the FCC's basic power to find that RKO lacked candor with the agency. Appendix A at 34a-35a, 38a. Yet the court made no effort to reconcile those authorities with its refusal to honor the procedural history that led the FCC to disqualify RKO in Los Angeles as well as Boston for that misconduct. Nor did the court reconcile this invasion of the FCC's docket management discretion with its own earlier decision in *Fidelity Television, Inc. v. FCC, supra,* which affirmed the FCC's 1973 conditional denial of Fidelity's application on the ground that "it is not our judicial job to direct the Commission how to run the comparative hearing process." 515 F.2d at 699. Having first been denied in the name of agency discretion, then denied again by the same court in a *usurpation* of agency discretion, Fidelity finds itself in the position of a blind sparrow caught in the middle of a badminton match.

Although the decision below is not final as to Los Angeles because it directs the FCC to consider anew whether RKO should lose the Los Angeles license, this Court should nevertheless grant certiorari. The decision raises in new form a question that this Court declared in *Vermont Yankee* to be of great significance in the area of administrative law. Indeed, the decision of the lower court in *Vermont Yankee* was likewise not final, because it remanded the case to the agency for further proceedings. Certiorari was nonetheless granted because the intrusion of that decision into agency procedural discretion "raise[d] questions of such significance in this area of the law as to warrant our granting certiorari and deciding the case." The Court gave as a further reason for granting certiorari — equally applicable here — that "[s]ince the vast majority of challenges to administrative agency action are brought in the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." 435 U.S. at 535 n. 14.

The decision below once again injects the court of appeals into a matter of agency procedural discretion, thus violating in principle the admonition directed to the same court in *Vermont Yankee*. To the extent the decision reflects a continuing failure by this court of appeals in the face of *Vermont Yankee* to heed the proper limits of judicial review and honor the proper exercise of agency discretion, such judicial overreaching will recur in future cases if it is not corrected now.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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April 19, 1982

Appendix

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1696

RKO GENERAL, INC.,
Appellant
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MULTI-STATE COMMUNICATIONS, INC.,
Intervenor

No. 80-1697

RKO GENERAL, INC.,
Appellant
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

FIDELITY TELEVISION, INC.,
MULTI-STATE COMMUNICATIONS, INC.,
Intervenors

No. 80-1698

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FEDERAL COMMUNICATIONS COMMISSION,
Appellee

FIDELITY TELEVISION, INC.,
NEW ENGLAND TELEVISION CORPORATION,
DUDLEY STATION CORPORATION,
MULTI-STATE COMMUNICATIONS, INC.,
COMMUNITY BROADCASTING OF BOSTON, INC.,
Intervenors

Appeals from Orders of the
Federal Communications Commission

Argued September 16, 1981

Decided December 4, 1981

J. Roger Wollenberg with whom *Joel Rosenbloom, A. Douglas Melamed, Barbara S. Wellbery, Bruce D. Ryan, W. Theodore Pierson, Harold David Cohen, William H. Fitz, Jack N. Goodman* and *William E. Willis* were on the brief for appellant.

L. Andrew Tollin, Counsel, Federal Communications Commission, with whom *Marjorie S. Reed*, Acting General Counsel, *David J. Saylor*, Deputy General Counsel, *Daniel M. Armstrong*, Associate General Counsel, *Lee J. Peltzman, Sue Ann Preskill* and *Linda L. Oliver*, Counsel, Federal Communications Commission, were on the brief for appellee.

Eugene F. Mullin with whom *B. Shelby Baetz, Nathaniel F. Emmons* and *Howard A. Topel* were on the brief for intervenor, Fidelity Television, Inc., in Nos. 80-1697 and 80-1698.

Joseph M. Morrissey was on the brief for intervenor, Multi-State Communications, Inc., in Nos. 80-1696, 80-1697 and 80-1698.

Philip Elam, Terry F. Lenzner, James H. Davis, Joseph F. Hennessey, Edward Hayes, Jr., and *Jay E. Ricks* were on the joint brief for intervenors, New England Television Corporation, et al., in No. 80-1698.

Before: TAMM, MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: The Federal Communications Commission (FCC) denied renewal of television licenses to RKO General, Inc. (RKO) in Boston, Los Angeles, and New York City. Renewal of the Boston license was denied because of a finding that RKO lacked the requisite character to be a licensee of that station. The denial of license renewals in Los Angeles and New York City followed from the Commission's earlier determination that the Boston finding would be *res judicata* in those proceedings.

RKO is a wholly owned subsidiary of General Tire & Rubber Company (General Tire).[1] General Tire, by its own admission, has engaged in a staggering variety of corporate misconduct. During the Boston proceeding, RKO withheld evidence of General Tire's conduct from the FCC, either because RKO sought to protect its parent or because the parent withheld information from the subsidiary in order to protect itself. The Commission, in turn, has disqualified RKO after years of delay in an opinion that is multifarious at best. We reject most of the grounds that the FCC used to justify its denial of RKO's license renewals. We affirm the Commission's decision that RKO lacked candor, but on a quite narrow ground that cannot automatically be applied to any other proceeding. Accordingly, although we uphold denial of the Boston license renewal, the proceedings in Los Angeles and New York City must be remanded.

The need for a remand and further action by the Commission is discomfiting in a fifteen-year-old case, but this extended proceeding has hardly been a model for the administrative process. We admonish all parties to get on with the task.

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[1] General Tire, which owns 100 percent of RKO's stock, was founded in 1915 by William O'Neil. Three of his sons and one daughter owned or controlled over nine percent of General Tire's stock as of July 1979, and each of the sons is a director of the company. T. F. O'Neil is Chairman of the Board of both General Tire and RKO, and is the Chief Executive Officer of RKO. M.G. O'Neil is President and Chief Executive Officer of General Tire. The Commission concluded that the two companies "are owned, controlled, and operated as a single integrated company." *RKO General, Inc. (WNAC)*, 78 F.C.C.2d 1, 60 (1980), at ¶ 119 [hereinafter cited as Decision, by ¶].

I. Procedural History

Extraordinary as it may seem, this case had its beginning in 1965, when RKO petitioned to renew its license for KHJ-TV in Los Angeles. The petition was opposed by a competing applicant on a variety of grounds, including the allegation that RKO had engaged in reciprocal trade practices.[2] A comparative hearing on the two applications led to a Commission finding in 1973 in favor of RKO,[3] subject to further findings on the reciprocity issue[4] in the Boston proceeding discussed below. A fuller history of these events may be found in *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975), which affirmed the Commission's decision.

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[2] *See RKO General, Inc. (KHJ-TV) (Initial Decision)*, 44 F.C.C.2d 149 (1969). Reciprocal trade practices are agreements whereby one company conditions its purchase of goods from another company on the second company's willingness to purchase other products from the first. The FCC found that General Tire frequently conditioned its purchases of goods and services on the expectation that the seller would purchase advertising time on RKO stations. Decision ¶ 2(a). The Decision concluded that such reciprocal trading "was anticompetitive, probably violative of the antitrust laws, and (in the case of RKO) corruptive of the normal free market process by which the demand for advertising time helps ensure that radio and television programming is responsive to public desires." *Id. See generally* Handler, *Emerging Antitrust Issues*, 49 VA. L. REV. 433 (1963); Hausman, *Conglomerate Mergers*, 77 HARV. L. REV. 873 (1964); Turner, *Conglomerate Mergers*, 78 HARV. L. REV. 1313 (1965).

[3] *RKO General, Inc. (KHJ-TV)*, 44 F.C.C.2d 123 (1973).

[4] In 1967, the Department of Justice had brought a civil suit against General Tire, RKO, and two other General Tire subsidiaries, charging that their reciprocal trade practices violated the Sherman Antitrust Act. *United States v. General Tire & Rubber Co.*, No. C-67-155 (N.D. Ohio, filed March 2, 1967). This action was still pending when the FCC designated a comparative hearing on renewal of WNAC in 1969. A consent decree was entered on October 21, 1970. 1970 Trade Cas. ¶ 73,303 (1970).

In the meantime, other competing applicants had challenged RKO's license renewal application for WNAC-TV in Boston, *RKO General, Inc. (WNAC)*, 20 F.C.C.2d 846 (1969). The FCC also designated a reciprocity issue in the Boston proceeding, and authorized that official notice be taken of the KHJ-TV record. Similarly, when RKO sought renewal of WOR-TV in New York City in 1974, the FCC determined that RKO's application would be bound by the record in the Boston proceeding then underway.[5]

With renewals in New York and Los Angeles conditioned upon its outcome, the Boston proceeding took on special importance. An Administrative Law Judge issued an initial decision in that proceeding on June 21, 1974, granting renewal to RKO despite affirmative findings as to RKO's reciprocal trade practices.[6] Exceptions and reply pleadings were then filed before the Commission in response to that initial decision. Before the FCC could act on these administrative appeals, however, RKO's parent corporation found itself enmeshed in an investigation by the Securities and Exchange Commission (SEC) that would greatly impact RKO's petitions to the FCC.

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[5] *RKO General, Inc. (WOR-TV)*, 46 F.C.C.2d 246 (1974). The intervenor in this proceeding was initially found financially unqualified but that decision was overturned in *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied sub nom. RKO General, Inc. v. Multi-State Communications, Inc.*, 440 U.S. 959 (1979).

[6] *RKO General, Inc. (WNAC-TV)* (initial decision), 78 F.C.C.2d 147, 254-335 (1974). The ALJ concluded that General Tire's "trade relations" practices "do not adversely reflect upon RKO's qualifications to continue a licensee of the Commission or to warrant comparative demerit." *Id.* at 347.

In a series of civil actions brought in 1974 and 1975, the SEC had charged that questionable domestic and foreign payments by American corporations and falsification of corporate financial records to conceal such payments violated the federal securities laws.[7] One of the SEC's targets was General Tire, and RKO's competing applicants in the Boston proceeding sought to take advantage of that fact. On December 10, 1975, Community Broadcasting of Boston, Inc. (Community) filed a petition to reopen the record for a hearing on "illegal and improper conduct" by General Tire in the United States and foreign countries, including bribery of officials, creation of secret accounts, misappropriation of foreign corporate funds, and deliberate concealment of these matters by General Tire and RKO.[8]

RKO opposed this move in a series of pleadings. On January 21, 1976, it urged that there was "no factual or legal foundation" for these charges.[9] In June 1977, well after the SEC had filed a complaint and obtained a consent decree against General Tire,[10] RKO continued to oppose the petition to reopen the record in oral argument before the Commission.[11] The consent decree required

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[7] *See, e.g.*, SEC, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, submitted to the Senate Comm. on Banking, Housing and Urban Affairs, May 12, 1976, *reprinted in* 642 FED. SEC. L. REP. (CCH), Part II (May 19, 1976).

[8] Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearing (Community Petition), December 10, 1975, J.A. 535. The petition was triggered by newspaper reports of an investigation of General Tire by the government of Chile. *Id.* at 4, J.A. 538.

[9] RKO Opposition to the Petition to Reopen the Record, Enlarge the Issues, and Remand for Further Hearing (RKO Opposition), January 21, 1976, at 5, J.A. 588.

[10] *Final Judgment of Permanent Injunction against the General Tire & Rubber Company and M.G. O'Neil*, No. 76-0799 (D.D.C. May 10, 1976).

[11] Transcript, WNAC-TV Proceeding, at 15406-08, J.A. 2641-43.

General Tire to conduct a review of its operations and prepare a Special Report, however. This report, which was released on July 1, 1977,[12] admitted a plethora of corporate misconduct, and documented inadequacies in RKO records for certain reports previously filed with the FCC. Nevertheless, RKO continued to oppose the need for further proceedings, claiming that all "essential facts" concerning its operation of WNAC were before the Commission, and that because resolution of Community's claims "turns on inferences and legal conclusions to be drawn from those facts, the Commission would be well within its authority in deciding this case without holding a further evidentiary hearing." [13]

For reasons that may be partially attributable to strategic maneuvering among two of the many RKO competitors,[14] the FCC did not act on Community's petition to reopen the Boston proceeding until June 21, 1979. A week later, the Commission directed the parties to file summaries of their positions and present oral argument on the following questions: [15]

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[12] The consent decree required creation of a Special Review Committee, composed of five non-management directors assisted by Special Counsel, who were to conduct

> an extensive investigation into the use of corporate funds for unlawful political contributions, gifts, entertainment or other disbursements for similar improper purposes; and use of corporate funds for improper payments to governmental employees and officials, foreign or domestic; the establishment and maintenance of, and transactions in, any secret or unrecorded funds; the use of agents and consultants for unlawful or improper purposes or in connection with unlawful or improper conduct: and such other similar matters as may be revealed during the course of the investigation.

Special Report at 27, J.A. 1267.

[13] RKO Response to Community Motion to Deny (RKO Response), October 28, 1977, at 34-36, J.A. 805-07.

[14] In 1978, the New England Television Corporation (NETV) was formed as the result of a merger between two of RKO's competing applicants for the Boston station, Community Broadcasting of Boston, Inc. (Community) and The Dudley Station Corporation (Dudley). After lengthy negotiations, Community and Dudley entered into a settlement agreement with RKO whereby RKO would sell its Boston license to NETV upon a finding by the FCC that

> (1) Is the record in this proceeding sufficient for the Commission to make a judgment:
>
> > (a) that RKO is qualified to remain the licensee of Station WNAC-TV, Boston, Massachusetts; or
> >
> > (b) that RKO is not qualified to remain the licensee of Station WNAC-TV, Boston, Massachusetts?
>
> (2) In the event that the record is sufficient to make either of the above judgments, what should that judgment be?

Oral argument was held before the Commission en banc shortly thereafter. The FCC concluded that it could answer the first question: RKO could not be found qualified to remain a licensee on the existing record. It decided to seek further information before answering the other questions, however.[16] Two days later, the FCC re-

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RKO possessed the requisite qualifications to be a broadcast licensee. Brief for Intervenors NETV, Dudley, and Community at 5. When the Commission could not find RKO minimally qualified, however, General Tire rejected NETV's offer to buy RKO's unlicensed assets. *Id.*

[15] FCC Order 79-403, June 28, 1979, J.A. 350. RKO reiterated its earlier claim that "[t]he record in this proceeding is fully sufficient for the Commission to adjudge that RKO is qualified to be a broadcast licensee and thus qualified to remain the licensee of WNAC-TV." Summary of RKO's Position, July 9, 1979, J.A. 834. It now urged, however, that the record was not sufficient for the FCC to adjudge RKO "unqualified." J.A. 839.

[16] Decision ¶ 43; *see* J.A. 352 (informal FCC announcement that "tentative" 4-2 vote had found record insufficient to permit finding RKO qualified).

opened the record to accept the Special Report into evidence, and urged that RKO "make a particularized proffer of specific evidence that it would introduce, if given the opportunity, to mitigate the findings" of that report.[17] RKO proffered evidence and affidavits in September 1979. RKO also now contended that it deserved additional hearings before the Commission could find it not qualified.[18]

On June 6, 1980, the FCC issued three companion orders resolving the WNAC proceeding and the two other license renewals that had been conditioned upon it.[19] The WNAC decision (Decision) focused on four specific areas of misconduct by RKO and General Tire: reciprocal trade practices by RKO and General Tire during the 1960s, *id.* at ¶¶ 58-92; General Tire's misconduct in a variety of nonbroadcast fields, *id.* at ¶¶ 93-162; inaccurate financial reports filed by RKO with the FCC, *id.* at ¶¶ 163-195; and RKO's general lack of candor during the course of the Boston proceeding, *id.* at ¶¶ 196-221. The Decision concluded that nothing in RKO's broadcast history mitigated these findings, *id.* at ¶¶ 222-32, and that absolute disqualification of RKO as a broadcast licensee was the only appropriate remedy, *id.* at ¶¶ 233-49. The companion orders accordingly disqualified RKO as a licensee of WOR-TV (New York) and KHJ-TV (Los Angeles).

Of the four grounds for disqualification, only reciprocal practices had been the subject of formal notice and hearing before an Administrative Law Judge. The FCC's findings as to General Tire's nonbroadcast misconduct and RKO's financial misrepresentations relied heavily on the Special Report. The findings concerning RKO's lack of candor rested on RKO's failure to make timely submission of the information contained in the Special Report, as reflected by RKO's earlier pleadings before the Commission. On each of these three points, the Decision rejected RKO's argument that it could not be disqualified without formal notice and hearing. *Id.* at ¶¶ 144-61 (General Tire's nonbroadcast misconduct); *id.* at ¶¶ 193-95 (financial inaccuracies); *id.* at ¶¶ 219-221 (lack of candor).

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[17] FCC Order 79-453, July 20, 1979, J.A. 353.

[18] J.A. 857, 869, 875, 880, 889, 1083 (proposed findings and conclusions filed by RKO, Broadcast Bureau, and four competing applicants).

[19] *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980) (the Decision); *RKO General, Inc. (KHJ-TV)*, 78 F.C.C.2d 355 (1980); *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357 (1980).

RKO appealed from all three orders denying license renewal, and the appeals were consolidated by this court.

II. INVALID BASES OF THE FCC DECISION

At the outset, we hold that the FCC has stated at least three independent grounds for its ultimate finding that RKO should be disqualified as a broadcast licensee in Boston.[20] The Decision states that RKO's reciprocal dealings "alone" require disqualification, *id.* at ¶ 92, that RKO's "willful and repeated [financial] misrepresentation warrants disqualification by itself," *id.* at ¶ 164, and that "perhaps of greatest importance, RKO has demonstrated a persistent lack of candor with the Commission in these proceedings," *id.* at ¶ 55(a). Our conclusion also follows from the structure and organization of the FCC Decision, which distinctly sets out findings of fact for each of these grounds and treats each of them as entirely separate. We must note that the FCC continues to struggle with the difficult art of drafting its opinions.

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[20] Were these grounds not independent, a remand would probably be required so that the Commission could articulate the "relative weight" of "the factors that affect its decision," and determine whether the disqualification of RKO is still appropirate. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980); *see United States v. Third National Bank*, 390 U.S. 171, 183 (1968).

In *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980), for example, we emphasized that the Commission has some burden to express the basis for its actions carefully:

> Where several violations are found, the Commission should set forth the role each plays in the assessment of penalty. Rarely should the agency be permitted to take a "gestalt" approach, one based upon a reaction to the "overall" situation rather than to each violation one at a time.

Id. at 463. Nevertheless, although we may not supply a reasoned basis for agency action that the agency itself has not given, courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974); *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). A fair reading of the Decision compels the conclusion that these three grounds are independent, and that in the FCC's view each one by itself required the disqualification of RKO as a licensee.[21]

This preliminary observation is important because we have grave doubts about the sufficiency of two of these grounds to support the FCC's action. The Commission's findings on reciprocal trading display a disconcerting willingness to judge the behavior of broadcast applicants by standards that had not been clearly enunciated when that behavior occurred. The finding that RKO knowingly submitted inaccurate financial reports and thereby intended to mislead the Commission raises extremely troublesome questions because of the FCC's failure to give RKO notice and a hearing on that issue. Moreover, we agree with the Commission that General Tire's nonbroadcast practices, the fourth focus of the FCC Decision, are "not disqualifying by themselves." Decision ¶ 140. The remand on the other two license renewals is occasioned at least in part by the rejection of these decisional grounds, to whose inadequacies we now turn.

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[21] Our conclusion is consistent with the FCC's subsequent argument, *see* FCC Brief at 97 n.215 (candor, misrepresentation, and reciprocal trade practices are "independent pillars" of Decision), and subsequent Commission opinions describing this RKO Decision. *See, e.g.*, *RKO General, Inc.*, 82 F.C.C.2d 291, 292-94 (1980), *appeal pending sub nom. New South Media Corp. v. FCC*, No. 80-2556 (D.C. Cir. filed December 22, 1980) (reciprocity, lack of candor, and false financial reports are "separate grounds" for disqualification); *Cowles Broadcasting, Inc.*, 49 RAD. REG.2d (P&F) 1138, 1148 n.47 (1981) (candor, reciprocity, and General Tire's nonbroadcast misconduct were "independent grounds" for disqualification); *Cablecom-General, Inc.*, 87 F.C.C.2d 784, 786 (1981) (reciprocal trade practices, false financial reports, and lack of candor were "separate grounds" for disqualification).

A. *Reciprocal Trade Practices*

There are several reasons to doubt that reciprocal trade practices during the early 1960s can justify outright disqualification of RKO as a broadcast licensee in 1980. First and foremost, the conduct of RKO at issue has been found to be clearly improper only in retrospect. Although it has been understood since the 1930s that "coercive" reciprocity was anticompetitive,[22] it was not until the late 1960s that a series of judicial decisions began to cast increasing doubt on the legality and propriety of unleveraged "mutual patronage" agreements.[23]

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[22] *E.g., California Packing Corp.*, 25 F.T.C. 379 (1937); *Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *Waugh Equipment Co.*, 15 F.T.C. 232 (1931). All three cases involved companies with substantial market power over their suppliers that used threats to withdraw future patronage unless reciprocal purchases were made. As a result, these cases "shed little or no light on the question of the legality of reciprocity arrangements in which neither participant possesses leverage." *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 57 n.150 (S.D.N.Y. 1966).

[23] *E.g., FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963);

Even then, however, questions remained.[24] As late as 1979, the FCC itself recognized that a *per se* rule was probably inappropriate because "it is still somewhat

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United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966). These cases condemned mergers because of a danger that the companies would engage in reciprocal trading, focusing on the legality under Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976), of conglomerate mergers in which the acquiring company had substantial market power over its suppliers.

[24] In *Consolidated Foods*, the Supreme Court observed that reciprocity "is one of the congeries of anticompetitive practices at which the antitrust laws are aimed," 380 U.S. at 594, and that anticompetitive effects "may ensue not from bludgeoning or coercion but from more subtle arrangements," *id.* The case stopped short of such a broad holding, however, because the Court recognized that the defendant corporation "commands a substantial share of a market" and that "the probability of a lessening of competition is shown." *Id.* at 595, 600. Other early cases also involved corporations with substantial market power. *E.g., General Dynamics*, 258 F. Supp. at 61-62; *Ingersoll-Rand*, 320 F.2d at 524.

Commentators also interpreted *Consolidated Foods* as requiring that companies be demonstrated to have the "necessary purchasing power." Kintner, *The Anatomy of Reciprocity*, 56 A.B.A.J., 232, 234 (1970). An Assistant Attorney General in the Antitrust Division later wrote that there was "respectable support for the proposition that mutual patronage reciprocity was legal" at least until 1967. *Tire Company Cases—U.S. Information Memorandum*, TRADE REG. REP. (CCH) ¶ 50,259, at 55,504 (1967). The Supreme Court had shown a related concern for market leverage in the tying cases, *e.g., Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). Judge Bazelon's dissent to denial of rehearing in *Fidelity Television, Inc. v. FCC*, 515 F.2d at 698, contended that reciprocal trading was manifestly illegal. He agreed, however, that there was a question about "the degree of market power necessary to make reciprocity illegal. There is some confusion in the cases, particularly when one refers to the tie-in cases, on whether some kind of market leverage must be shown to make reciprocity illegal." *Id.* at 720 n.59. it has been suggested recently that in some cases reciprocity may be innocuous and that in others it may have "economic virtues." *Industria Siciliana Asfalti, Bitumi v. Exxon*, 1977-1 Trade Cas. ¶ 61,256, at 70,779 n.4 (S.D.N.Y. 1977).

uncertain whether a non-coercive unleveraged reciprocal agreement . . . necessarily and in every case is anticompetitive and a Sherman § 1 violation." *Domestic Public Message Services,* 73 F.C.C.2d 151, 161 (1979). As a result, although we are not in absolute agreement with RKO that the challenged conduct was "undertaken in good faith,"[25] the FCC's conclusion rests not on a fair reading of the contemporaneous law but upon a "greater appreciation now for the adverse impact of reciprocal trade practices on the broadcast industry and thus on the public interest." Decision ¶ 86 n.156. The FCC unquestionably has the authority and even the duty to change its mind as to the degree of anticompetitive practices that are not in the public interest. *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir.), *cert. denied,* 403 U.S. 923 (1971). Such a finding may not be applied retroactively, however, to conduct that ceased almost fifteen years ago. *Securities Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 203 (1947).[26]

We are particularly concerned that in retroactively applying its "greater appreciation" for the adverse effects of reciprocal trading, the FCC has abruptly reversed its decision to the contrary in *RKO General, Inc.* (*KHJ-TV*), 44 F.C.C.2d 149 (1969), *aff'd sub nom. Fidelity Television, Inc. v. FCC*, 515 F.2d 684. That case held that essentially the same conduct was neither disqualifying nor ground even for a comparative demerit.[27] Failure to explain the reversal of directly controlling precedent is unlawful. *See, e.g., Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965). "Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." *Boston Edison Co. v. FPC*, 557 F.2d 845, 849 (D.C. Cir.), *cert. denied sub nom. Towns of Norwood, Concord and Wellesley, Mass. v. Boston Edison Co.*, 434 U.S. 956 (1977). Although the FCC conditioned its first decision on RKO's reciprocal dealings on the possibility that significant new evidence might be introduced in the subsequent WNAC proceeding, such evidence never appeared. Additional evidence of reciprocal trading was heard in that second proceeding, but the bulk related to nonbroadcast activities by General Tire rather than RKO, and the remainder was merely cumulative of evidence in the first proceeding.[28]

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[25] *See, e.g.,* Hausman, *supra* note 2, at 882 (despite widespread reciprocal trading, most businessmen detested the practice); Turner, *supra* note 2, at 1390 & n.100 (1965) (predicting rough treatment for nonleveraged reciprocal trading "when appropirate cases reach the courts"). By 1970, when test suits against a number of corporations including General Tire had established the illegality of noncoercive reciprocity, most businessmen had already abandoned their "trade relations" voluntarily. Kintner, *supra* note 24, at 233.

[26] *See Pressley v. FCC,* 437 F.2d 716, 721 n.5 (D.C. Cir. 1970) (before FCC can find bad character on basis of applicant misconduct, there must be "adequate prior notice of a standard by which conduct can be measured"); *Straus Communications, Inc. v. FCC,* 530 F.2d 1001, 1011 (D.C. Cir. 1976) ("The licensee's violation, then, consisted fundamentally in failing to predict the new interpretation"); *AFL-CIO v. FEC,* 628 F.2d 97, 101 (D.C. Cir.), *cert. denied,* 449 U.S. 982 (1980) ("uncertainty as to the meaning of the law can be considered in assessing the element of willfulness in a violation of the law").

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[27] In the original KHJ-TV proceeding in Los Angeles, the Commission had found that "the relevant legal and economic concepts were in a state of flux at the time covered by this record, that neither responsible officials nor the courts had given any clear explanation of the applicability of the broadly drawn [antitrust] statutes, and that there was accordingly no certainty that trade relations practices were improper." *RKO General, Inc. (KHJ-TV)*, 44 F.C.C.2d at 129-30. In the initial decision in the WNAC proceeding in Boston, the ALJ concluded: "The extensive additional evidence adduced herein merely reinforces the conclusions reached in the KHJ-TV proceeding." Initial Decision, 78 F.C.C.2d at 333, ¶ 378.

Finally, we doubt the Commission's claim that it can predict RKO's future character and performance from evidence concerning conduct that took place between 1961 and 1964.[29] Only the unusual nature of these proceedings allows the FCC to argue that such evidence is at all relevant. FCC precedents consider a licensee's behavior during the preceding license term relevant to renewal requests for the following term. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). RKO sought renewal of WNAC for the 1969-1972 term, and the FCC has failed to allege acts of reciprocity during the earlier term from 1966 to 1969. But RKO's renewal application for KHJ concerned the 1965-1968 term, thereby giving the FCC an excuse for claiming that conduct from 1962 to 1965 "is precisely the conduct at issue." Brief for Appellee FCC (FCC Brief) at 36 n.59. Even so, the FCC acknowledges that the recency of misconduct is an important factor for purposes of character evaluation. Decision ¶ 55(c); *see Miami Valley Broadcasting Corp.*, 78 F.C.C.2d 684, 738-39 (1980). The Commission has not paid sufficient heed to that principle here.

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[28] In *Fidelity Television, Inc. v. FCC,* this court noticed that there was "a fairly substantial record . . . on the reciprocity practices of RKO, not merely in its operation of KHJ, but throughout the entire broadcast side of its business." 515 F.2d at 696-97. *See* 78 F.C.C.2d at 137 (Commissioner Lee dissenting) ("additional evidence" in WNAC proceeding was "essentially the same evidence" considered in KHJ proceeding). It has always been clear that RKO's use of reciprocity has been less than that of other General Tire subsidiaries, and nothing in the Decision alters this conclusion. RKO also notes that the Decision refers to only two documents not in the KHJ-TV record: an advertising agency letter of August 1962, and a letter from Lyon Van Lines to a General Tire official in 1964. We are troubled by the FCC's conclusion that RKO engaged in coercive reciprocity with Equitable Life Assurance Society, Decision ¶ 83(1), because there is no finding that General Tire had the market power necessary to "overbear the will of the other party." *Id.* at ¶ 68. The FCC shows only that General Tire paid an annual premium to Equitable of $14 million in 1968, and makes much of aggressive remarks by one employee. *Id.* at ¶ 83(1); *see* FCC Brief at 58 n.112. But the requisite market power cannot be found in mere size or posturing alone. The Commission's finding that Equitable "eventually acceded" to the supposedly coercive threats of General Tire rests on an advertising agency letter of August 1962, some six months prior to the time that General Tire's "coercion" supposedly occurred. Decision ¶ 83(1).

[29] RKO contends that the bulk of its trade relations practices ended before 1965, and the rest by 1966. *See* Initial Decision, 78 F.C.C.2d at 252-323, ¶¶ 254-363. The 1967 suit against General Tire by the Department of Justice, *see* note 4 *supra,* resulted in a consent decree in 1970, and there is no allegation that any violation of that decree has occurred. All five examples of reciprocity cited by the FCC in its Decision concerned conduct that took place between 1961 and 1965. Decision ¶ 83.

Nothing in our opinion diminishes the force of the FCC's now clear statement that reciprocity by broadcast licensees is a prohibited practice. The Commission has laid down the rule that those who induce others to advertise on their stations for reasons unrelated to the station's programming or audience will do so at their peril. We agree that the purposes of the Communications Act are best served by leaving stations to obtain advertising and customers on the basis of their rates and audience, and that even unleveraged reciprocal trading distorts the normal free market process in the broadcast industry by which the demand for advertising time helps ensure that radio and television programming is responsive to public desires. *See* Decision ¶¶ 66-74. Competition in the broadcast industry means that a broadcaster should "survive or succumb according to his ability to make his programs attractive to the public," *FCC v. Sanders Bros.*, 309 U.S. 470, 475 (1940), and reciprocity injects an extrinsic factor that breaks the link between program quality and revenues. This rule has now been articulated forcefully, and future violations should be treated with the firmness expressed by the FCC in this case. Nevertheless, this ground cannot justify disqualification of RKO for nonleveraged, mutual patronage agreements during the early 1960s.

B. *Financial Misrepresentations*

The Commission's finding that RKO submitted intentionally false financial reports is equally insufficient to support RKO's disqualification. The Decision states that "RKO knowingly certified to the Commission that certain financial reports were complete and accurate when RKO knew otherwise." *Id.* at ¶ 164. The FCC's conclusion presumes that RKO's inaccuracies were either deliberate and intentionally deceptive, *Big Valley Cablevision, Inc.*, 75 F.C.C.2d 702, 714 (1980); *Kaye-Smith Enterprises*, 71 F.C.C.2d 1402, 1415 (1979), or that RKO's reports were made with such "wanton, gross, and callous" disregard for their truth as to reflect the equivalent of such an "affirmative and deliberate intent." *Golden Broadcasting Systems, Inc.*, 68 F.C.C.2d 1099, 1106 (1978); *see Leflore Broadcasting Co. v. FCC*, 636 F.2d at 462. Despite the fact that RKO had consistently denied acting with such intent or disregard, the FCC brushed aside proffered RKO affidavits to that effect and drew adverse inferences without allowing RKO to defend itself in a hearing. Such a procedure was not lawful.

The FCC justifies its finding on the basis of the Special Report, which included numerous corporate admissions that RKO's recordkeeping had been sloppy and inaccurate. Specifically, General Tire conceded in the Special Report that RKO's accounting for trades and barters[30] had been incomplete for the previous five years.

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[30] Trade and barter transactions are exchanges of a station's broadcast time for goods, products, and other services. RKO's controller criticized internal accounting procedures for these barters

The FCC seized on the repeated attempts by RKO's controller to improve the recording of such information to infer that he "had to know that RKO's barter information was inaccurate" as early as 1972. Decision ¶ 179. This inference was unwarranted. RKO's objections to such summary factfinding are well taken, because the admitted inaccuracy of the reports still left issues as to RKO's motive and intent that could only have been determined in what the FCC itself had called "the crucible of an evidentiary hearing." *Walton Broadcasting, Inc.*, 78 F.C.C.2d 857, 877 (1980). It is absurd to claim that "RKO's underlying motives were not decisionally significant, and thus any supposed factual issues as to motivation was immaterial," FCC Brief at 111, when the issue is not whether the reports were inaccurate but whether they were *knowingly* so. Given RKO's sworn statements that it made no willful misrepresentations, it was error to deny RKO the timely opportunity to present live witness testimony with the bald statement that RKO's affidavits were "not credible." Decision ¶ 182. The FCC's finding turned on RKO's intent, "and thus demands that the decision-maker weigh witness credibility." *Nasem v. Brown*, 595 F.2d 801, 807 (D.C. Cir. 1979). Moreover, had the FCC formally designated this charge and given RKO a hearing in which to rebut it, the Commission would have had the opportunity to explore what possible reason RKO might have had for in-

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in December 1972. Special Report at 223, J.A. 1463. On May 13, 1974, an internal audit discovered "failures to fully comply with . . . prior directives," Affidavit of RKO Controller John B. Fitzgerald, August 23, 1979, J.A. 970, and found "serious deficiencies" in financial records. The controller issued another directive on July 10, 1974, but a second internal audit in 1976 revealed that "many of the problems found in 1974 still exist." Special Report at 225, J.A. 1465. An investigation by an outside accountant confirmed these findings. The Special Report concluded: "RKO's files were found by Arthur Young to be incomplete and unreliable, which created inaccuracies on the FCC Form 324 reports as well as on internal trade status reports." *Id.* at 226, J.A. 1466.

tentionally misreporting information that is apparently considered of minor significance by the FCC itself.[31]

The Special Report does demonstrate a pervasive failure to maintain adequate records at RKO stations, a failure that does nothing to recommend RKO as a broadcast licensee. But it is a far leap from this to the finding that RKO intentionally or knowingly misrepresented financial information to the Commission. Section 309 of the Communications Act, 47 U.S.C. § 309(e) (1976), requires the Commission to hold a hearing in cases where "a substantial and material question of fact is presented," and to specify "with particularity the matters and things in issue but not including issues or requirements phrased generally." Whether RKO submitted inaccurate reports knowingly and with intent to mislead the Commission remains an unresolved and material question of fact, and it was therefore error for the Commission to disqualify RKO without following the procedures outlined by the statute.[32]

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[31] The FCC did not require reports of trade and barter information until 1971, in *Rand Broadcasting Co.*, 22 RAD. REG. 2d (P&F) 155 (1971) (interpreting 47 C.F.R. § 73.3611). On February 17, 1972,, the FCC issued a Public Notice reminding licensees of the requirement that this information be included in the annual financial reports (Form 324). *Reporting "Trade Outs,"* 34 F.C.C.2d 439 (1972). RKO emphasizes that the figures a broadcaster was required to certify were necessarily to be based on estimates, and that RKO's controller was required only to certify the forms as correct to "the best of my knowledge, information and belief." RKO Brief at 27 & n.79. *See* 78 F.C.C.2d at 137 (Commissioner Lee dissenting) (FCC "has recognized in its instructions to Schedule 1 of FCC Form 324 that values for trade and barter income are, at best, estimates"). Indeed, the Commission acknowledged in 1980 that "the current financial data are neither reliable . . . nor are they consistent across different stations," and that "these problems are principally due to the inadequacies of the design of the form itself and are not the fault of stations that file the reports." *Notice of Proposed Rulemaking*, BC Docket No. 80-190, 45 Fed. Reg. 35370, 35372 (May 27, 1980). It is therefore not clear whether RKO's filings differed appreciably from those of other licensees. Moreover, barter transactions are said to account for less than five percent of total station revenues, and to have no effect on net profit figures because the revenues exactly offset the expenses. *See* 39 FCC ANN. REP. 225, 228-76 (1973).

C. *General Tire's Nonbroadcast Misconduct*

The FCC found it unnecessary to reach the question of whether RKO would have been disqualified had the only adverse character evidence been that relating to General Tire's nonbroadcast misconduct. Decision ¶ 140. Instead, the Commission found that General Tire's misconduct had "an adverse effect on RKO's qualifications" and lent "substantial weight" to the Commission's decision to disqualify RKO on each of the other grounds. *Id.* at ¶¶ 93, 140. We find nothing unlawful in this approach, although it raises other questions.

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[32] The FCC relies on a lengthy line of cases upholding its discretion to decide whether hearings on petitions to deny are necessary. *E.g., United States v. FCC*, 652 F.2d 72, 90 n.87 (D.C. Cir. 1980); *National Ass'n. for Better Broadcasting v. FCC*, 591 F.2d 812, 815 (D.C. Cir. 1978); *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974); *Stone v. FCC*, 466 F.2d 316, 322-23 (D.C. Cir. 1972); *Marsh v. FCC*, 436 F.2d 132, 135-36 (D.C. Cir. 1970). *But see Los Angeles Women's Coalition v. FCC*, 584 F.2d 1089 (D.C. Cir. 1978); *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 305 (D.C. Cir. 1967). These cases are inapposite because they do not concern denials of applications without a hearing. The fact that an application can be *granted* without a hearing has no bearing on whether an application may be *denied* without a hearing on whether an application may be *denied* without a hearing when there are unresolved, material questions of fact.

Similarly, the FCC's procedures for summary judgment require Commission notice that summary disposition is intended on "issue set for hearing." 47 C.F.R. § 1.251(a)(1) (1979). Before an agency may use such procedures, it must be able to show that evidentiary hearings could serve no purpose. *USV Pharmaceutical Corp. v. Secretary of HEW*, 466 F.2d 455, 461 (D.C. Cir. 1972). The FCC cannot make such a showing here, and certainly has not given the requisite notice. Indeed, in 1977 the Commission rejected a Freedom of Information Act request by Community for RKO's Form 324 reports because "[w]e cannot see how the Special Review Committee has placed RKO's financial reports in issue before this Commission." *See* Decision ¶ 194 n.393.

As General Tire's own admissions in the Special Report illustrate, its conduct in nonbroadcast fields hardly enhances RKO's character assessment. General Tire's misconduct, ranging from bribery and fraud abroad to the maintenance of secret cash funds for political contributions at home, inevitably casts a shadow on the character of its wholly owned subsidiary. We have no reason to doubt that "General Tire is institutionally inclined to sacrifice obedience to law and proper business ethics in pursuit of corporate revenue and political influence." Decision ¶ 2(f). Were RKO's owner a single individual as opposed to a corporation, it appears that a far lesser showing of character flaws would support disqualification. *See, e.g., Wadeco, Inc. v. FCC*, 628 F.2d 122, 128 (D.C. Cir. 1980); *Star Stations of Indiana, Inc.*, 51 F.C.C.2d 95 (1975). For reasons that are far from clear, however, the FCC seems to distinguish between misconduct by individual owners and misconduct by corporate entities. *See, e.g., Katy Communications, Inc.*, 87 F.C.C.2d 764, 766-67 (1981); *Southern Bell Telephone and Telegraph Co.*, 82 F.C.C.2d 322, 327 (1980); *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 406 (1976), *rev'd on other grounds sub nom. Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979); *Kaiser Broadcasting Corp.*, 46 F.C.C.2d 589, 598 (1974).

It is difficult to discern any legitimacy for such differential treatment of individual as opposed to corporate owners.[33] It is to be hoped that pending FCC efforts to clarify the character standards to be applied in comparative hearings will cast more light on this point. *See Policy Regarding Character Qualifications in Broadcast Licensing: Notice of Inquiry*, 87 F.C.C.2d 836 (1981). In any event, the FCC has not tried in this appeal to increase the significance attached to corporate misconduct in nonbroadcast areas, *see* FCC Brief at 92 n.207, 132, nor could it have done so without first serving notice that its policy had changed. *See Doubleday Broadcasting Co. v. FCC*, 655 F.2d 417, 423 (D.C. Cir. 1981) ("The Commission may not decide a case one way today and a substantially similar one another way tomorrow, without a more reasonable explanation that is offered here."). The nonbroadcast misconduct of General Tire, egregious as it has been, has small practical significance in the FCC's decision to disqualify RKO. The importance of this corporate misconduct has not been inflated, and although the Commission appropriately weighed it against RKO, that misconduct has not been offered as a foundation for the denial of RKO's license renewals.[34]

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[33] *But see FCC v. WOKO, Inc.*, 329 U.S. 233, 228 (1946) (FCC is not bound "to deal with all cases at all times as it has dealt with some that seem comparable"). The FCC notes that corporate misconduct often can be cured by replacing management and directors, whereas individual malfeasants may not so easily change their spots. *See* Decision ¶¶ 233-35.

In short, three of the four areas on which the FCC focused in its Decision will not serve as a basis for RKO's outright disqualification, at least on this record. It is not necessary to underscore our criticism too pointedly, however. We uphold the Commission's disqualification of RKO in the Boston proceeding because we conclude that the Decision's ultimate basis, RKO's lack of candor before the FCC, fully and independently supports that judgment.

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[34] RKO correctly observes that the record provides no basis for finding that any RKO officer or director participated in the General Tire misconduct or knew of that misconduct until the disclosures arising from the SEC investigation and the related internal inquiries of the General Tire board. RKO Brief at 71. *See* RKO Proposed Findings, Conclusions and Proffered Evidence, August 27, 1979, Aff. 1 (T.F. O'Neil) at 1-2, J.A. 940-41. The ALJ found that General Tire leaves the operation of RKO stations to the RKO stations to the RKO Board of Directors and management. Initial Decision, 78 F.C.C.2d at 254, ¶ 260. Although General Tire's chief executive officer, M.G. O'Neil, was one subject of the SEC consent decree, *see* note 10 *supra*, no such decree was filed against his brother T.F. O'Neil, the chief executive officer of RKO.

III. RKO'S LACK OF CANDOR

The Commission found that three instances demonstrated RKO's lack of candor before the agency during a period from 1975 to 1977. First, RKO failed to inform the FCC that there was a factual basis to the allegations first made against General Tire by Community in late 1975. Decision ¶¶ 197-205. Second, RKO failed to report the initiation of a formal SEC investigation of General Tire in February 1976. *Id.* at ¶¶ 206-12. Finally, RKO failed to concede that it had inaccurately reported trade and barter revenues when pressed to do so by Community in April 1977, despite the indication in General Tires' 1976 Annual Report that there might be some problems with these accounts. *Id.* at ¶¶ 213-18.

A. *The Merits of the FCC's Finding*

The record fully supports the Commission's finding that RKO did not display full candor before the Commission during the period from late 1975 to July 1976. Uncontroverted documentary evidence shows that General Tire responded to the initial phase of the SEC's inquiry regarding overseas operations in May 1975. Special Report at 30, J.A. 1270. As the SEC investigation progressed, RKO's competitors began pressing the FCC to reopen the Boston proceeding, alleging facts that were similar or identical to the admissions later made by General Tire in the consent decree and its Special Report.[35] RKO's first response was to seek an extension of time in which to respond, citing the need to consult with "persons who may have knowledge of the pertinent facts." RKO Motion for Extension of Time, December 12, 1975, J.A. 582-83. More than a month later, in January 1976, RKO clearly decided to stonewall the opposition and the FCC. This seems the only explanation for RKO's decision to file a document opposing the suggestion that the Boston proceeding be reopened on the ground that "there is no factual or legal foundation for this pyramid of charges," that "the charges, as we show below, are groundless," and that other charges were "essentially unsupported.'[36]

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[35] Based on three volumes of exhibits totaling 640 pages, Community alleged that General Tire had engaged in "illegal, unethical and improper conduct in the United States . . . and in foreign countries," including the bribery of foreign public officials, establishment of secret accounts to evade banking and tax codes of foreign

RKO contends that these statements were technically correct.[37] Brief for Appellant RKO (RKO Brief) at 33. It adds that because the burden lay on Community to

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nations, and defrauding stockholders of its partially owned subsidiaries. Community further alleged that these activities violated securities and tax laws of the United States, and that RKO had attempted "to conceal, mislead and deceive" the FCC as well as the public by failing to disclose material information relevant to these allegations. Community Petition, *supra* note 8, J.A. 535. General Tire ultimately admitted all of these practices in its Special Report, after acknowledging the preliminary findings of several investigations in its 1975 Annual Report and 10-K. J.A. 686.

[36] RKO Opposition, *supra* note 9, at 5, 17, J.A. 588, 600. RKO also noted gratuitously that Community had failed to "assert any improper political contributions by General Tire in the United States." *Id.* at 5 n., J.A. 588 n.

[37] *See* RKO Brief at 33 & n.92 (Opposition was "a straightforward pleading"). This appears to have been the interpretation of the FCC's Broadcast Bureau. See Broadcast Bureau's Comments on Supplement to Reply, March 22, 1976, at 4, J.A. 693. In a later statement, the Broadcast Bureau suggested that RKO's Opposition "presented arguments relating to the inadequacy of Community's showing and not factual assertions." Broadcast Bureau Reply of September 24, 1979, at 16, J.A. 1207. The Commission also concedes that RKO's statements "may have been technically correct." FCC Brief at 63.

establish grounds for reopening the proceeding,[38] RKO's pleadings "in context" merely claimed that this burden had not been met. Both arguments are irrelevant, because the question before the FCC was not so much what RKO said as what it had failed to say.

Section 1.65 of the Commission's Rules requires applicants to inform the Commission within thirty days whenever "there has been a substantal change" regarding any matter that may be "of decisional significance in a Commission proceeding involving the pending application." 47 C.F.R. § 1.65 (1979). This requires that an applicant inform the Commission "of *all* facts, whether requested in [renewal] Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors." *Southern Broadcasting Co.*, 38 F.C.C.2d 461, 464 (Rev. Bd. 1972) (emphasis in original). Unlike a private party haled into court, or a corporation such as General Tire facing an investigation by the SEC, RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," FCC Brief at 60, and license applicants may not indulge in common-law pleading strategies of their own devise.

The Decision and the record on which it is based demonstrate irrefutably that RKO did not meet these standards, and that RKO's conduct thus threatened "the integrity of the Commission's processes." *RKO General*,

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[38] Congress amended the Communications Act in 1960 to require that petitioners seeking to deny a license renewal must provide a more substantial evidentiary showing than had previously been required in order to force the Commission to designate a hearing. *See* S. REP. No. 690, 86th Cong., 1st Sess. 3 (1959). The FCC's rules require that factual showings necessary to meet this burden be made by affidavit. 47 C.F.R. § 1.229 (1979).

Inc., 82 F.C.C.2d 291, 306 (1980). In spite of an SEC investigation that was rapidly gathering steam, and in spite of the fact that its qualifications as a licensee were at issue before the FCC, RKO failed to come forward with a candid statement of relevant facts. RKO did not inform the FCC that the SEC had issued a formal order of investigation in February 1976, even though this suggested the seriousness of the charges against General Tire.[39] RKO did not advise the FCC of the SEC's preliminary findings until May 14, 1976, despite the fact that General Tire had advised its stockholders of these preliminary findings in February when it released its 1975 Annual Report.[40] RKO did not advise the FCC until May 1976 that General Tire's own internal investigation demonstrated that many of the SEC concerns were valid, even though Community had submitted General Tire's 10-K Report the previous March.[41] RKO never once attempted to amend or supplement its earlier pleadings with the FCC, despite a growing awareness of the facts that General Tire would later admit in its Special Report. These instances involve a lack of candor through omission. Whether or not RKO would have had an obligation to come forward with these facts under other circumstances,[42] it could not have doubted their relevance once the filings and petitions of the intervenors put these questions before the Commission. We need not decide whether RKO's pleadings were affirmatively misleading—it is enough to find that they did not state the facts.

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[39] The FCC contends that had the SEC investigation continued only a few months longer, "the Commission might never have known about the investigation or been in a position to condition any renewal on the outcome of the investigation and any resulting litigation." FCC Brief at 78-79. RKO responds that it would have been "absurd" for RKO to "cover up" the SEC investigation in light of contemporary newspaper reports of that investigation. RKO Reply Brief at 17; *see* Wall Street Journal, Feb. 12, 1976, at 4, col. 2, J.A. 569; Washington Post, Feb. 13, 1976, at A6, col. 1. But other, more prominent parties have attempted such cover-ups in the past despite even greater attention from the media, and in any event the Commission cannot be expected to reply only on hearsay sources for the information required under section 1.65.

[40] General Tire's 10-K reported investigations in Morocco, Romania, Chile, and "yet another foreign country" that raised issues concerning the possibility of "improper or illegal payments to foreign government employees." It added that a pending internal investigation "includes the matter of political contributions in the United States by executive level employees" of General Tire. J.A. 686-89.

[41] Community Supplement to Reply (Supplement to the Reply), March 16, 1976, & Att. A., J.A. 678, 686. RKO argues that even if § 1.65 applied, Community performed RKO's task for it by filing

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copies of General Tire's 10-K with the Commission before the rule's 30-day limit had expired, and thus "RKO's candor cannot be faulted because it failed to duplicate that filing." RKO Brief at 39. The argument is specious to a fault. When candor is the question, the actions of the intervenor can hardly be used to bear witness. Community's filing in no way diminished RKO's responsibility to be candid and forthcoming with the Commission, yet this omission by RKO even in the fact of continual promptings by its competitors is symptomatic of RKO's attitude through early 1976.

[42] RKO argues, for example, that it was not required by contemporaneous FCC precedents to report the SEC investigation until it culminated in "formal charges" against General Tire. *See Lake Erie Broadcasting Co.*, 33 F.C.C.2d 1009 (Rev. Bd. 1972), which held that an investigation sparked by the accusations of outside complainants as opposed to official charges by a governmental agency did not require immediate notification of the FCC. Although the Commission has shifted away from this rule, *e.g., Payne of Virginia, Inc.*, 66 F.C.C.2d 633 (1977), that case was decided subsequent to RKO's disclosure of the SEC investigation in May 1976. We need not decide, however, whether the SEC decision in February 1976 to upgrade its enforcement activities from a preliminary to a formal investigation should have been reported under *Lake Erie*. In the context of the facts described above, it defies reason to imply that SEC enforcement activities were immaterial to the pleadings and claims then pending before the FCC. RKO can be faulted not for failing to report marginally relevant accusations, but for failing to realize from the change in the SEC's enforcement activities that its earlier statements to the Commission had been grossly inadequate.

The record suggests that RKO had ample motive for its failure to act with total candor during this period. There are numerous indications that General Tire initially decided to oppose the SEC investigation[48] and did not begin to cooperate with that agency until sometime in the spring of 1976. Clearly, it would have been pointless for General Tire to resist the SEC inquiry at one level while RKO came forward with damaging evidence against General Tire before the Commission. *See* Decision ¶ 202. But such conjecture is not relevant, because the documents speak for themselves. It is also unnecessary to show that RKO officials had actual knowledge in early 1976 of the improprieties and illegalities to which General Tire later admitted, or that RKO officials willfully intended to misrepresent these facts to the FCC. Whether RKO sought to protect its parent, or whether the parent withheld information from the subsidiary in order to protect itself, the result is the same. We cannot improve on the language of FCC counsel: "It is obvious that where a complete disclosure of facts will militate against the interests of this organization, the Commission will be deprived of that information. It is irrelevant where in the RKO-General Tire organizational structure this breakdown in candor first occurs. In the end, RKO, as the public trustee, is responsible for the reliability of the information and representations furnished by it to the Commission." FCC Brief at 70; *see* Decision ¶ 122 n.248.

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[48] *See* Decision ¶ 202 ("in refusing to be more forthcoming, RKO adopted a posture consistent with General Tire's SEC defense strategy. General Tire was resisting SEC document and other enforcement demands at least into February 1976."). General Tire's Special Report admitted that the SEC's Division of Enforcement had sought particular information from the corporation on December 5, 1975, but that "[n]o substantively complete answer was ever given to the SEC letter" of that date. Special Report at 31, J.A. 1271. A second letter was sent by Enforcement on January 22, 1976, and SEC staff members met with General Tire representatives on February 3. At this meeting, General Tire's vice president and former general counsel made "[s]harp, sarcastic comments" and at one point "advised an Enforcement staff member against holding his breath while waiting for submission of additional material because 'you'll turn blue.'" *Id.* at 32, J.A. 1272.

B. *RKO's Defenses*

RKO objects to the FCC's finding on a variety of grounds. First, it contends that "there is not a shred of evidence that . . . the Commission was in fact 'misled' " by RKO. RKO Brief at 33. Such an argument has no pertinence to this appeal, as the Supreme Court observed forty years ago:

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.

FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). As the Commission correctly emphasizes, it must rely on the applicants who come before it for the truth of their representations; it cannot countennace willingness to mislead simply because there is no evidence that the Commission was in fact misled.

Equally unpersuasive is RKO's objection that its decision not to inform the Commission of the SEC investigation was made on advice of counsel. RKO Brief at 38 & n.102. It is true that reliance on counsel may render a severe sanction such as disqualification too harsh in some circumstances. *See Asheboro Broadcasting Co.*, 20 F.C.C.2d 1, 3 (1969); *cf. WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969). But "advice of counsel cannot excuse a clear breach of duty by a licensee." *Asheboro*, 20 F.C.C.2d at 3. The client becomes fully responsible at some point, and that point is reached more quickly in practice before the FCC than in courts of law. *E.g., Wadeco, Inc. v. FCC*, 628 F.2d at 128; *Lorain Community Broadcasting Co.*, 18 F.C.C.2d 686, 688 (1969), *aff'd sub nom. Allied Broadcasting, Inc. v. FCC*, 435 F.2d 68 (D.C. Cir. 1970). Similarly, although we agree that "legal argument is not testimony by a party or a representation by its counsel as to facts," RKO Brief at 34, we cannot excuse the calculated omissions in RKO's legal pleadings on this basis. In modern America, parties communicate with administrative agencies almost exclusively through lawyers, but this is all the more reason why we cannot assume that RKO did not know what its lawyers were saying—particularly when the number of pleadings and other opportunities for dissembling were as great as recounted above. It is not credible that lawyers were running the strategy of RKO and General Tire to the exclusion of all the corporate chiefs.

RKO's most persuasive objection to the FCC finding that it lacked candor is that the finding was made without giving RKO formal notice and a hearing on the charge. The FCC acknowledges a "technical failure to issue such a formal designation order," FCC Brief at 113 n.234 and admits that "[i]n the normal case a hearing probably would have been warranted." *Id.* at 97. Ordinarily, such an admission would constitute grounds for reversal, for courts "have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi v. Leslie*, 404 U.S. 496, 502 (1972) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). We conclude, however, that RKO's conduct has been so egregious and so conspicuous that we cannot say the FCC's decision was an abuse of its authority. No purpose would have been served in this case by extending administrative proceedings that had already moved well into their second decade. The evidence of RKO's lack of candor was obvious from the documents that RKO itself had submitted to the FCC in this proceeding, as the applicants competing with RKO had been arguing for years. The Commission needed only to draw legal conclusions from "facts already known." *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919, 924 (D.C. Cir. 1973). In this context, the FCC was not required to designate the candor issue and reopen the proceeding for an evidentiary hearing that would have served no purpose. *See, e.g., Independent Bankers Ass'n. of Georgia v. Board of Governors of the Federal Reserve*, 516 F.2d 1206, 1220-22 (D.C. Cir. 1975); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). This is especially true where RKO itself had urged that there was no need to reopen the proceeding because resolution of Community's claims "turns on inferences and legal conclusions" to be drawn from facts already before the Commission. *See Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("Appellant took its chance that the Commission, on the existing record, would [find in its favor]. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence.").

In reaching this determination, we start with the emphatic differences between a broadcast applicant before the FCC and one who faces the possibility of punishment. RKO has suffered a hardship as a result of the FCC's action, but it has not been punished; denial of a renewal application "is not a penal measure." *FCC v. WOKO, Inc.*, 329 U.S. at 228. As the Decision explains, the FCC's purpose is not to punish licensees for past wrongs, but to ensure that these "fiduciaries of a great public resource" will "satisfy the highest standards of character commensurate with the public trust that is reposed in them." *Id.* at ¶ 3; *see id.* at ¶ 249 & n.477. A broadcast license is less a property right than a privilege, *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 35 (D.C. Cir. 1950), and retention is not automatic but must be earned.

In practical terms, this means that "proceedings before the Commission are not private law suits," and that the Commission does not function "as an umpire blandly calling balls and strikes for adversaries appearing before it." *See Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for renewal every three years. FCC Brief at 60 n.114. As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. *See, e.g., Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980); *Golden Broadcasting Systems, Inc.*, 68 F.C.C.2d at 1101-04. The Commission has said before that "no specific misrepresentation or lack of candor issues are needed to consider these matters, since the Commission always has authority to deny a license or application where the record reveals such misconduct." *Radio Carrollton*, 69 F.C.C.2d 1139, 1146 n.20 (1978), *aff'd mem. sub nom. Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. October 15, 1980), *cert. denied*, 101 S.Ct. 1758 (1981). *See Grenco, Inc.*, 39 F.C.C.2d 732, 737 (1973) ("no one is allowed 'one bite' at the apple of deceit").

Ultimately, of course, the procedures of the Commission must be measured against the demands of due process as well as the statutory requirements of the Communications Act. But it is a truism that due process standards in this context are fluid rather than fixed. In

WJR, The Goodwill Station, Inc. v. FCC, 337 U.S. 265 (1949), a unanimous Court held that the FCC was not required to provide oral argument before ruling that a radio station's petition in a pending proceeding did not state facts sufficient to raise legal issues concerning the possible modification of that station's license rights. "[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *Id.* at 276. Subsequent cases have never departed from this proposition. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 268 n.15 (1970); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) ("The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another.").

Section 4(j) of the Communications Act, as amended, 47 U.S.C. § 154(j) (1976), empowers the FCC to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice." In *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Court held that Congress in that section had "explicitly and by implication" delegated to the FCC the power to resolve "subordinate questions of procedure." The Court upheld that delegation in light of the established principle that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 143. In *FCC v. Schreiber*, 381 U.S. 279, 292 (1965), the Court reiterated these observations in deciding whether a district court could substitute its own rules for the FCC's procedures governing public disclosure of its investigations. "The delegated power, of course, may not be exercised arbitrarily, but its exercise may not be impeached merely because reasonable minds might differ on the wisdom thereof." The Court also rejected the standard of review applied by the court of appeals: "The question for decision was whether the exercise of discretion *by the Commission* was within permissible limits, not whether the District Judge's substituted judgment was reasonable." *Id.* at 291 (emphasis by the Court). *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

It is true that these recognitions of the FCC's discretion over certain questions of procedure have been cited most frequently to support agency control over dockets and hearing formats. When a statute dictates that parties receive notice and a hearing, of course, the provision of those basic procedural rights is not left to be decided by administrative "flexibility" or "discretion." For that reason, RKO contends that Section 309 of the Act, 47 U.S.C. § 309 (1976), requires a hearing prior to the denial of a renewal application even when there are no substantial or material questions of fact. RKO Brief at 15-23. *See Gottfried v. FCC*, 655 F.2d 297, 310 (D.C. Cir. 1981); *United States v. FCC*, 652 F.2d 72, 88-92 (D.C. Cir. 1980). But such a literal approach to the words of the Act cannot govern this case, in which RKO had already been the subject of FCC proceedings that had lasted for years. The question is not whether RKO was entitled to a hearing under Section 309, but whether during the course of agency proceedings in which this candor issue arose in the most obvious and unavoidable manner, the Commission was required to call a halt to its proceedings, designate the issue formally, and begin again.

We conclude that such an approach in this case would not have promoted "the proper dispatch of business" and "the ends of justice." At some point in any administrative process, someone must determine whether the remaining issues are factual or legal, and whether hearings that have already been held must be supplemented by further proceedings. The initial answer must come from the agency, subject always to judicial review, but courts may defer to agency expertise and discretion here no less than on questions of docket management and the need for oral argument. Our decisions show the inherent difficulty of defining this administrative discretion. *Compare Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968) ("elemental fairness" used to judge whether FCC application requirements were sufficiently clear to obviate need for hearing on incomplete submission) *with Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961) (where application fails in material respects to comply with FCC rules concerning application contents, agency can reject application without hearing). Nevertheless, in appropriate situations, agency resolution of "subordinate questions of procedure" will be respected. In *Ranger*, we held that Section 309 requires a hearing only if, "with the required information before it," the FCC still cannot make a determination as to whether granting the application would be in the public interest. *Id.* at 242. We thereby recognized the FCC's authority to determine without an evidentiary hearing whether applicants had submitted "the required information." *Cf. Guinan v. FCC*, 297 F.2d 782, 785 (D.C. Cir. 1961) (FCC need not designate comparative hearing "once it has been established that one of the competing applicants is basically unqualified" because of frequency interference). The Commission's discretion should also be respected in this case, in which RKO has obviously failed to supply the information required for consideration of its merit in the public interest.

We find a compelling if imperfect analogy between this case and "historical exceptions to the general principle that punishment can only follow a determination of guilt after trial or plea—exceptions such as the power summarily to punish for contempt of court." *Bell v. Wolfish*, 441 U.S. 520, 536 n.17 (1979).

> Where the contempt is committed directly under the eye or within the view of the court, it may pro-

> ceed "upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form."

In re Savin, 131 U.S. 267, 277 (1889) (quoting *Ex parte Terry*, 128 U.S. 289, 309 (1888)). In these extraordinary situations, "[t]here is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary." *Cooke v. United States*, 267 U.S. 517, 534 (1925). The rule is as old as Blackstone, see 4 W. BLACKSTONE, COMMENTARIES *282-*285, and continues to have vitality in this day. *E.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). Modern jurisprudence may reveal a greater sensitivity for the notice and hearing requirements of due process than did an earlier age, of course. *See Taylor v. Hayes*, 418 U.S. 488, 498 (1974). Nevertheless, the cases continue to suggest the existence of a dividing line between events that take place "before the judge's own eyes," *id.* at 499, or "in the face of the court," *Ex parte Terry*, 128 U.S. at 313, and situations in which "some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements . . . ." *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971). There is no doubt here as to which side of that line RKO's conduct falls. The Commission has drawn legal conclusions after comparing what RKO said in its earlier pleadings—and what it did not say—with RKO's subsequent admissions, such as General Tire's Special Report. RKO does not for a moment contend that it has in fact been candid with the Commission, nor do we see how it possibly could. No evidence remains to be introduced; no witnesses have been denied a chance to speak. There are no further issues to try. The FCC has not assumed the answers to any questions of fact, but has simply examined uncontested and uncontestable documents that are in the record at RKO's own election.

Because the Commission had "so perfect a knowledge" of the RKO misconduct that was evident from the documents directly before it, we cannot say that the Commission's action was erroneous. Forty years ago, in *FCC v. Pottsville Broadcasting Co.*, Justice Frankfurter reflected on the "movement for administrative regulation." He observed:

> Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest . . . . These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.

309 U.S. at 142-43. The cases upholding summary punishment for in-court contempts without the need for formal notice or a separate hearing *a fortiori* support the disqualification of RKO. As we explained above, this case does not involve punishment at all, but the renewal of a public trust.[44]

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[44] We also agree that the Commission properly refused to consider a General Tire stock spin-off proposal that would have passed RKO's stock through General Tire to that company's 45,000 shareholders. *See* note 45 *infra*. This proposal threatened to violate the FCC policy that "a licensee cannot act improperly in the broadcast field and, when challenged, simply sell his station at a profit or without a loss if this were permitted, such a licensee would have little reason to obey the Act . . . ." *Tidewater Teleradio, Inc.*, 24 RAD. REG. (P&F) 653, 657 (1962); cf. *Grayson-Enterprises, Inc.*, 79 F.C.C.2d 936, 938 (1980). Similarly, General Tire's assurances of

Our decision to affirm the FCC's action should not be read to include situations not covered by this unique record. The Commission concedes that "this case is unprecedented," FCC Brief at SA-1, and we expect that successors if any will be rare. Before the FCC can take action of this sort in the future, we believe that at least three conditions must be met in order to protect the parties. First, not only must the misconduct occur directly before the agency, but it should be of such a blatant and unacceptable dimension that its existence cannot be denied. The FCC has satisfied itself that this is the case with regard to RKO, whose lack of candor "is abundantly clear." Decision ¶ 196. Second, although formal notice may not always be necessary, it should be evident that the party has some form of actual notice of the conduct said to be at issue, and must not be prejudiced by surprise. Finally, the party must be given an "opportunity to speak in [its] own behalf in the nature of a right of allocution." *Groppi v. Leslie*, 404 U.S. at 504. The procedure adopted by the FCC in this case satisfies these requirements, at least insofar as the Boston renewal is concerned. RKO does not contend that it was prejudiced by the lack of notice, for it undoubtedly had actual notice of the candor issue, as the pleadings filed prior to the Commission's decision demonstrate.[45]

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remedial action did not deserve more weight than the Commission gave them, because "promises of future compliance made after apprehension have not been accorded much weight." Decision ¶ 234. The ruling that RKO's misconduct outweighs any favorable evidence of WNAC's broadcast performance or other mitigating factors is, of course, properly within the Commission's discretion. *See* Decision ¶¶ 223-49.

[45] Community had contended since 1975 that General Tire and RKO attempted "to conceal, mislead and deceive" the FCC, corporate shareholders, and the public by failing to disclose material information pertaining to Community's allegations. Community Petition, *supra* note 8, at 5-6, J.A. 539-40. Community repeated that charge in its Supplement to the Reply, *supra* note 41, at 6-7, J.A. 683-84 ("the Commission must now seriously question the lack of

See Harbenito Broadcasting Co. v. FCC, 218 F.2d 28, 31 (D.C. Cir. 1954). "If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings." *Kuhn v. CAB*, 183 F.2d 839, 842 (D.C. Cir. 1950). RKO does not contend that it was denied any opportunity to present for the Commission's determination any matter of fact or law, or that the Commission has not given all matters submitted by RKO due and full consideration. *See WJR v. FCC*, 337 U.S. at 284. RKO had a full opportunity to speak in its own behalf, and exercised it in pleadings, proffers

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good faith and candor of RKO. . . . RKO has failed to meet the minimal standards of candor, required of Commission licensees."). More than a year later, Community referred to RKO's "dissembling and lack of candor in this proceeding" and argued that lack of candor was "the darkest blot on RKO's record . . . ." Community Motion to Deny, September 13, 1977, at 2, 22, J.A. 737, 757. Community also reiterated this charge in its reply to RKO's Response, note 13 *supra*. Community Reply, December 16, 1977, J.A. 811.

The FCC also foreshadowed the candor issue in May 1977 when it denied General Tire's proposal to spin-off its RKO stock. The FCC cautioned that it had "not yet ruled on the merits of Community's petition to enlarge issues," *RKO General, Inc. (WNAC-TV)*, 64 F.C.C.2d 713, 718 (1977), but its refusal to act on the proposal because of "the undesirable possibility of impeding the conduct of an adjudicatory proceeding" by eliminating "adversarial development of the facts," *id.* at 718, 719, must be considered notice to RKO of the seriousness of its situation.

Indeed, in October 1977, RKO spent several pages answering the lack of candor charge. RKO Response, *supra* note 13, at 14-19, J.A. 785-90. In September 1979, when RKO responded to FCC Order 79-453, *see* note 17 *supra*, it made the same claims to the Commission that it has on this appeal, arguing that "the procedural context in which RKO's responses were made disproves Fidelity's claims that RKO has not been candid." RKO Response, September 24, 1979, at 56, J.A. 1183; *see id.* at 51-61, J.A. 1178-88. The FCC contends that these pleadings and other materials show that "RKO had far more actual notice than the typical designation order would provide." FCC Brief at 113 n.234.

of proof, and oral argument before the Commission.[46] We cannot say that the FCC abused its discretion by not giving RKO a formal hearing on issues arising from RKO's conduct during the initial proceeding.[47] Section 309 was not intended by Congress to reward delay and concealment that disserves the public interest. "Congress did not intend by this section of the statute to require the formality of Commission consideration of and [re]hearing on an application in which the signatory obviously fails in major material respects to abide the regulations." *Ranger v. FCC*, 294 F.2d at 243. *Cf. Storer Broadcasting Co. v. FCC*, 351 U.S. 192, 205 (1956) ("We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing."). The FCC's denial of the Boston license renewal must therefore be affirmed.

IV. THE LOS ANGELES AND NEW YORK CITY PROCEEDINGS

The narrow basis of our decision concerning RKO's Boston license illustrates why the FCC may not deny license renewals in Los Angeles and New York City simply because it happened to condition those proceedings on the Boston outcome. RKO's lack of candor during the Boston proceeding justifies its disqualification there because the misconduct took place directly before the trier of fact and has bearing on its general character, but the same cannot be said of the Los Angeles and New York City proceedings. The latter was conditioned on the Boston outcome in order to avoid making the parties "relitigate those issues" that had already been specified with regard to Boston. 46 F.C.C.2d at 249. By contrast, the former had been conditioned on the reciprocity issue only, in order to "enable the Commission to proceed with the Los Angeles matter and bring it to a conclusion with no risk to the public interest." *RKO General, Inc. (KHJ-TV)*, 31 F.C.C.2d 70, 74 (1971). The FCC could not have known, when it conditioned either of these proceedings as it did, that the Boston outcome would turn on a lack of candor issue that had not even been designated in the Boston proceeding. RKO's misconduct did not occur directly before the trier of fact in either the Los Angeles or New York City proceedings. Accordingly, these decisions must be remanded to the Commission for further consideration as it deems appropriate.

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[46] The full transcript of the oral argument held before the Commission on July 18, 1979, is not in the record before us. Nevertheless, the pleadings submitted by RKO before that proceeding amply demonstrate RKO's opportunity to address any factual or legal issues concerning its lack of candor. *See* note 45 *supra*.

[47] Indeed, RKO's interpretation of Section 309 would create the possibility that an incorrigible applicant could prolong hearings indefinitely, as each instance of egregious conduct in one proceeding would require new designation and a subsequent proceeding. Renewal applicants have an obvious financial stake in delaying unfavorable resolutions of their applications as long as possible. RKO, for example, is still operating the stations involved in this case, pending resolution of this appeal. *See* Brief of Intervenor Multi-State Communications, Inc. at 35 ("the abundant 'due process' already accorded RKO has provided it with licenses (and income) for many more years than it should have had.").

This conclusion is buttressed by the Commission's own discussion of what effect, if any, RKO's Boston disqualification should have on its other broadcast licenses. In an order released on November 26, 1980, the FCC designated thirteen RKO stations for hearing, but held those proceedings in abeyance until resolution of this appeal. *RKO General, Inc.*, 82 F.C.C.2d 291, *appeal pending sub nom. New South Media Corp. v. FCC*, No. 80-2556 (D.C. Cir. filed December 22, 1980). One purpose of the separate proceeding will be to allow RKO "to introduce evidence on meritorious programming with respect to the 13 other stations and any other mitigating evidence with respect to the remaining licenses." *Id.* at 318.

Now that the issues in the Boston proceeding have been sorted out, the same treatment is appropriate for RKO's New York City and Los Angeles licenses. The judgment that RKO showed a lack of candor in the Boston proceeding is *res judicata*, of course, and is not subject to collateral attack in these subsequent proceedings. *See id.* at 312-18. The Commission may give that finding whatever weight it considers appropriate. Indeed, it may well be that such a finding is inconsistent with a licensee holding a license anywhere, although that decision is for the Commission in the first instance. At the same time, our remand of these proceedings is more than just an empty exercise. Each of RKO's renewal applications arises in different contexts and presents different levels of complexity.[48] For example, the Los Angeles renewal was tentatively granted in 1973 subject only to future reciprocity findings. Because we have rejected reciprocity as a legitimate basis for disqualification of RKO in Boston, the Los Angeles situation may seem quite different when that proceeding is remanded. At the FCC noted, "We do agree with RKO that collateral estoppel will only apply to those grounds on which the court bases its decision." *Id.* at 317. Similarly, individual stations have different broadcast histories and policies. Although the FCC found that WNAC in Boston had a "mediocre to poor record with respect to news, public affairs, and local programming," Decision ¶ 227, it made no new findings at all with regard to KHJ in Los Angeles and WOR in New York City. These stations are entitled to an opportunity to appear directly before the Commission and to argue that they deserve different treatment than RKO's Boston station. After such a proceeding, of course, the Commission's broad latitude in "the choice of remedies and sanctions" must be respected. *Leflore Broadcasting Co. v. FCC*, 636 F.2d at 463 (quoting *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied sub nom. W.W.I.Z., Inc. v. FCC*, 383 U.S. 967 (1966)).

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[48] KHJ-TV in Los Angeles and WOR-TV in New York City stand in very different positions, although this may be a distinction without a difference. KHJ's license renewal was granted, subject only to the FCC finding on reciprocity in the Boston proceeding that we now reject. WOR's license renewal was held in abeyance pending the resolution of the Boston renewal. *Cf. KFPW Broadcasting Co.*, 47 F.C.C.2d 1090 (1973), in which the Commission reversed denial of an application despite its earlier decision that renewal proceedings for the applicant's second station would be res judicata as to the application. The license renewal had been denied on character grounds, but the denial of the application was reversed because the licensee's misconduct occurred before the new station came on the air. *Id.* at 1095-96.

CONCLUSION

This opinion will not close a sorry chapter in the history of American communications law. We must remand the Los Angeles and New York City proceedings because the FCC has not yet provided a principled explanation for RKO's disqualification as a licensee of those stations. The FCC's findings that RKO intentionally misrepresented financial information and engaged in unlawful reciprocal trade practices cannot stand, for one was reached without notice or hearing and the other constitutes an ex post facto application of new standards to conduct that is long past.

We affirm the FCC's decision in the Boston proceeding, however, because the Commission's finding that RKO displayed an egregious lack of candor in that proceeding does not suffer from either of these infirmities. During an administrative review that had already lasted for years, the FCC suddenly was confronted by documentary evidence establishing beyond doubt that RKO had been less than candid with the Commission in the very proceeding under way. The FCC could observe all material facts for itself, simply by comparing the documents that had already been submitted with those that were now before it.

The denial of a license renewal to a major licensee in a major market is of manifest moment and financial impact. The FCC's decision has not been reviewed callously, and we have tried not to lose sight of the difficult issues in this case by sweeping the reasoning of the Commission under a rug of agency expertise or administrative convenience. The record presented to this court shows irrefutably that the licensee was playing the dodger to serious charges involving it and its parent company. The Commission was entitled to ask whether such conduct, however convenient for corporate purposes, was consistent with the candor required of an applicant for a license to the public airwaves. We believe the Commission's answer is not open to doubt. The disqualification of RKO as a licensee of WNAC in Boston is affirmed.

It is so ordered.

APPENDIX B

Anti-competitive Practice
Candor
Concealment
Misrepresentation
Renewal of License Denied
Hearing, Necessity for

> Application for renewal of license denied for lack of candor, concealment of decisionally significant information, and participation in anti-competitive practices. Further evidentiary hearings unnecessary since conclusions were reached on the bases of facts in record not in dispute. DO. 18759

FCC 80-331

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 18759
File No. BRCT-63

In Re Applications of
RKO GENERAL, INC. (WNAC-TV) Boston, Massachusetts

For Renewal of Broadcasting License

Docket No. 18760
File No. BPCT-4198

COMMUNITY BROADCASTING OF BOSTON, INC.
Boston, Massachusetts

Docket No. 18761
File No. BPCT-4277

THE DUDLEY STATION CORPORATION,
Boston, Massachusetts

For Construction Permit for
New Television Broadcast Station

DECISION

(Adopted: June 4, 1980; Released: June 6, 1980)

Appearances

Harold David Cohen, W. Theodore Pierson, William H. Fitz, Leon J. Schachter, and John F. Lillard, III (Pierson, Ball & Dowd); of Counsel: Jack N. Goodman, Benjamin J. Griffin, Maurice Baskin, and Frederic T. Spindel (Pierson, Ball & Dowd) and William J. Kirby, Marvin Schwartz, Philip K. Howard, and William E. Willis (Sullivan & Cromwell), on behalf of RKO General, Inc.; Jay E. Ricks, Marvin J. Diamond and Richard S. Rodin (Hogan & Hartson), Terry F. Lenzner (Wald, Harkrader & Ross), Charles Fabrikant, Thomas H. Truitt, Robert B. Cornell, Thomas C. Matthews, Jr., and Lewis M. Popper, (Truitt, Fabrikant, Bucklin & Lenzner), Walter H. Sweeney, (Welch & Morgan), on behalf of Community Broadcasting of Boston, Inc.; Edward Hayes, Jr. (Hayes & White), Special Counsel, and Joseph F. Hennessey (Lovett, Ford & Hennessey, P.C.), on behalf of The Dudley Station Corporation; Joseph F. Hennessey, Michael D. Jones, and Lawrence J. Bernard, Jr., (Lovett, Ford & Hennessey, P.C.), on behalf of the New England Television Corporation; Charles W. Kelley, William D. Silva, Lawrence Bernstein, Aaron Shainis, Bruce A. Eisen, and P. W. Valicenti, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission; Leonard C. Meeker on behalf of National Citizens Committee for Broadcasting and Friars of the Atonement, *amicus curiae*; Eugene F. Mullin, Nathaniel F. Emmons and Howard A. Topel (Mullin, Conner and Rhyne, P.C.), on behalf of Fidelity Television, Inc., Charles Owen Verrill, Jr. (Patton, Boggs & Blow), Joseph M. Morrissey (Welch & Morgan), and Charles O. Blaisdell, on behalf of Multi-State Communications, Inc., Steven R. Rivkin, on behalf of Hub Broadcasting, Inc.

BY CHAIRMAN CHARLES D. FERRIS FOR THE COMMISSION: COMMISSIONERS LEE, QUELLO, AND WASHBURN DISSENTING AND ISSUING STATEMENTS.

1. The Commission has before it for consideration the application filed by RKO General, Inc. (RKO), for renewal of its license for station WNAC-TV, Channel 7, Boston, Massachusetts, covering the 1969-1972 license period.[1] The Commission also has the separate competing applications for Channel 7 filed by Community Broadcasting of Boston, Inc. (Community) and The Dudley Station Corp. (Dudley). The Commission designated those applications for hearing on December 11, 1969. Finally, the Commission has the Initial Decision of the Administrative Law Judge in this proceeding and numerous pleadings, all of which are identified in appendix A to this decision.

2. After careful and thorough examination of the entire record developed in this proceeding and in related proceedings in which RKO was a party, and taking into full account RKO's proffered evidence and accompanying affidavits, the Commission finds that the grant of RKO's license renewal application is not in the public interest and, therefore, must be denied.[2] A broadcast license

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[1] RKO is a wholly-owned subsidiary of General Tire & Rubber Company (General Tire). General Tire is a diversified company with approximately 50,000 holders of its common stock. General Tire through RKO and the latter's subsidiaries conducts various media operations, including radio and television broadcasting and cable television systems. The broadcasting operations of General Tire are centered in RKO, which is the licensee of the following stations: KHJ, KRTH(FM), KHJ-TV, Los Angeles, California; WRKO, WNAC-TV, WROR(FM), Boston, Massachusetts; WOR, WXLO(FM), WOR-TV, New York, New York; WHBQ-TV, WHBQ, Memphis, Tennessee; KFRC, San Francisco, California; WGMS, Bethesda, Maryland; WGMS-FM, Washington, D.C.; WAXY(FM), Ft. Lauderdale, Florida; and WFYR(FM), Chicago, Illinois.

[2] As explained below, however, we are not yet prepared to resolve the question as to which, if any of the present applicants, should be granted the license for Channel 7 in Boston. That will be the subject of further Commission proceedings.

provides an opportunity to use a limited and vital public resource. A broadcast license is not granted as a matter of right. It is a privilege. To obtain that privilege, we must be assured that an applicant will respect applicable laws, rules, and policies in serving the public interest. In this case we are not persuaded that RKO will operate WNAC-TV in a proper and law-abiding fashion consistent with the public interest or that RKO will be honest and forthcoming with this Commission and, ultimately, with the public. It should be emphasized that there are no substantial and material questions of fact that need to be resolved by further hearings. Indeed, as discussed more fully below, the record clearly and convincingly demonstrates the following facts:

(a) In close cooperation with its parent, General Tire, and its sister subsidiaries, RKO participated in a reciprocal trade practices scheme which began as early as 1961 and which was not officially terminated until after commencement of the term for which license renewal is sought. The purpose and effect of this scheme was to obtain customers for the General Tire family (including RKO) not on the basis of quality, service, and price but on the basis of the General Tire conglomerate's large scale buying power. This reciprocity scheme was anticompetitive, probably violative of the antitrust laws, and (in the case of RKO) corruptive of the normal free market process by which the demand for advertising time helps ensure that radio and television programming is responsive to public desires.

(b) RKO filed with the Commission and certified as true and complete Annual Financial Reports for 1972-1976 for each of its broadcast stations. At the time of the filing and certification, RKO and the official who signed the certification knew that the entries relating to trade and barter transactions were materially false. For several years thereafter, and despite pleadings to elicit the truth about the matter, RKO not only failed to disclose the Reports' inaccuracies but also made statements patently designed to conceal from the Commission the fact that RKO knew of the inaccuracies and false certifications.

(c) Despite a 1972 Commission public notice and the plain language of the Annual Financial Report form and instructions requiring accurate trade and barter data, RKO failed to exercise sufficient control over trade and barter record-keeping at its stations and made policy judgments which contributed substantially to the continued inaccuracy of those records. In this, as well as at least one other area (sponsorship identification), RKO's derelictions reflected a lack of supervisory control and a lack of concern for compliance with the Commission's rules and applicable laws.

(d) RKO demonstrated a general lack of candor in its dealings with the Commission in this proceeding. At important junctures, in contravention of Commission rules and general principles of candor, RKO willfully withheld from the Commission information that RKO knew to be relevant and material to the license renewal proceeding. RKO also made statements to the Commission that RKO knew would have the tendency to mislead the Commission on relevant and material matters.

(e) The relationship between RKO and General Tire is such that the conduct and character of General Tire bears substantially on RKO's qualifications to be a licensee. The nature and relevance of that close relationship is demonstrated, among other things, by the following:

(1) the fact that RKO is a wholly owned sub sidiary, necessarily subject to the ultimate control and policy direction of General Tire and necessarily dependent upon that parent for information needed to comply fully and truthfully with various Commission information reporting requirements;

(2) the fact that General Tire is controlled by a single family and that one brother in that family is chairman of the boards of directors of both General Tire and RKO while another brother is president and a director of General Tire, a third brother is a director of General Tire, and their sister's husband is a director of RKO;

(3) the fact that for years RKO worked closely with General Tire and the other General Tire subsidiaries in implementing the company-wide anticompetitive reciprocity program;

(4) the fact that RKO, through lack of candor and misleading statements, concealed from Commission and public scrutiny information regarding General Tire misconduct until General Tire was no longer subject to investigation by the Securities and Exchange Commission.

(f) Over a period of twenty years, including the license term in question, General Tire participated in a wide variety of illegal and improper conduct, both domestically and abroad. This array of misconduct, much of which was initiated by or acquiesced in by top General Tire officials, demonstrates that General Tire is institutionally inclined to sacrifice obedience to law and proper business ethics in pursuit of corporate revenue and political influence. Our view is buttressed by General Tire's decision to retain in positions of power certain key officials largely responsible for the misconduct itself and the long-time lack of corporate controls to prevent misconduct by subordinates. Among other things:

(1) From sometime in the 1960's until the investigation by the SEC, General Tire carried out a variety of secret schemes to make illegal domestic political contributions.

(2) For many years prior to the commencement of the investigations by the SEC and other authorities, General Tire, through its wholly-owned international subsidiary and with the approval and/or acquiescence of key corporate officials:

(i) systematically overbilled and denied the benefit of the rebates to partly-owned foreign affiliates, thus defrauding its partners in those affiliates of millions of dollars, in direct violation of General Tire's fiduciary duty to those partners;

(ii) bribed foreign officials not only to gain business for itself but to prevent the construction of competing operations in foreign countries; and

(iii) financed its illegal activities through secret accounts and covered these activities up through falsification of records and other forms of intentional misrepresentation.

3. We wish to emphasize at the outset that this decision is not "punishment" for past wrongs. Our sole and proper concern here is with the prospective operation of WNAC-TV and the other broadcast stations affected by this decision. Broadcasters are by Act of Congress tem-

porary permittees—fiduciaries of a great public resource—who must satisfy the highest standards of character commensurate with the public trust that is reposed in them. In this case we are presented with a broad record of illegal, immoral, and unethical practices, stretching over many years and reaching to the highest levels of the General Tire organization. We have concluded, on the basis of reasonable inferences from past misconduct, that there can be (and is) no assurance that in the future RKO will be a dependable and trustworthy trustee of the public airwaves. We recognize that disqualification of RKO may have a substantial economic impact on General Tire's shareholders, most of whom are undoubtedly innocent of any personal misconduct. But, in this case, the principle of law and the need to protect the public interest must prevail over private concerns. Nor does the potentially large dimension of that economic impact warrant special consideration. The Communications Act does not envision one standard of justice for small-town, single station licensees and a less demanding standard for big city, multiple station licensees. The decision to disqualify RKO is fully consistent with a long line of decisions in which we have felt compelled to disqualify far smaller entities than RKO to fully protect the public interest.

4. Renewal proceedings involving RKO television stations KHJ-TV, Los Angeles, California (Docket Nos. 16679-80) and WOR-TV, New York, New York (Docket Nos. 19991-2) have been expressly conditioned on the Commission's findings as to RKO's qualifications in this proceeding. Hence, the Commission's decision that RKO is not qualified to hold the license for WNAC-TV, Boston is *res judicata* with respect to those other proceedings and requires similar findings that RKO is not qualified to hold the licenses for the New York and Los Angeles stations. The findings in the instant matter may also be *res judicata* with respect to RKO's qualifications to hold other broadcast interests; however, as explained below,

we will solicit comments from RKO and other interested parties as to the impact, if any, that our decision today should have on those other broadcast holdings.

5. Like many of our comparative hearing cases, this matter is an extremely complex one that has been explored and argued in Commission proceedings for many years. The issues have been aired, clarified and debated at length. The record is voluminous. Accordingly, it may be useful here to outline the manner in which this decision proceeds. The first section details the background of the case, including the procedural history; the second section discusses the issues we decide today and the Commission's bases for resolving them; and the last section sets forth further proceedings that will have to be conducted in light of today's decision.

I. *Background*

6. On December 31, 1968, RKO filed an application for renewal of license covering station WNAC-TV on Channel 7 in Boston, Massachusetts. On February 28, 1969, Community filed an application for a construction permit for a new television station to operate on Channel 7 in Boston. On July 8, 1969, Dudley similarly filed an application for a construction permit for a new television station to operate on Channel 7 in Boston. By Order released December 11, 1969, the Commission consolidated and designated for hearing the mutually exclusive applications of RKO, Community and Dudley, 20 FCC 2d 846.[3] The following issues, among others, were designated against RKO:[4]

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[3] Following the court's decision in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201 (D.C. Cir. 1971), which invalidated the controlling standards in comparative renewal proceedings, the Commission redesignated this matter for hearing, FCC 72-145, released February 24, 1972. See also 35 FCC 2d 100 (1972).

[4] Issues were also designated against Community and Dudley. Those latter issues need not be discussed at this time.

(1) To determine with respect to the application of RKO General, Inc., whether in view of the evidence concerning alleged anticompetitive practices by RKO General, Inc., or its parent corporation, General Tire and Rubber Co., RKO General, Inc. should be disqualified to remain a licensee of the Commission or if not so disqualified, whether a comparative demerit should be assessed against it in this proceeding.

(2) To determine whether RKO General, Inc., violated the sponsorship identification provisions of Section 317 of the Communications Act of 1934, as amended, and Section 73.654 of the Commission's Rules with respect to the broadcast of the "Della Reese Show", and, if so, the effect thereof on the requisite and/or comparative qualifications of RKO General, Inc. to remain a Commission licensee.[5]

A. *Initial Decision*

7. In an Initial Decision, FCC 74D-36, released June 21, 1974, Administrative Law Judge Forest L. McClenning found Dudley financially unqualified and RKO comparatively preferred over Community and Dudley. He therefore recommended the grant of RKO's renewal application and denial of the challengers' applications. In part, the Judge's recommendation was based on his finding that RKO had not knowingly engaged in improper anticompetitive practices and his finding that RKO warranted only a comparative demerit for its mishandling of the "Della Reese" programs. The bases for the Judge's findings are explained below.

1. *The Anticompetitive Issue*

8. The Judge [illegible] ind that General Tire manufactured a wide variety of products. At the time of the Initial

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[5] Issue added August 12, 1970, 25 FCC 2d 633 (Rev. Bd.).

Decision, General Tire owned or controlled major subsidiaries which, besides RKO and its subsidiaries,[6] included Aerojet-General Corporation (engaged in the fields of rocket propulsion, electronics, ordinance and specialty manufacturing and technology diversification) and A.M. Byers Company (engaged in the manufacture and sale of wrought iron, mining equipment and machinery, and steel castings). (I.D. para. 256.) During the period 1960 through 1970, the consolidated sales of General Tire and its major subsidiaries, other than RKO, ranged between $949.7 million and $1.087 billion (I.D. para. 258.)

9. The Judge found that General Tire, Aerojet, and Byers purchased substantial quantities of various supplies and materials throughout the United States for use in the production of manufactured goods.[7] General Tire, Aerojet, and Byers likewise shipped and arranged for the shipment of substantial quantities of supplies, materials, and manufactured goods via common carriers, including truck lines and railroads which had truck line subsidiaries. (I.D. para. 257.)

10. General Tire formally organized a trade relations division in 1961, with John G. Ragsdale as its director. Prior to this time, the trade relations function at General Tire was not formally organized, although C. F. Burke, an assistant to the president of General Tire, had engaged in some activities of a trade relations nature. (I.D. para. 271.)

11. John Ragsdale's function as Director of Trade Relations was to use General Tire's purchasing power as

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[6] RKO owns, *inter alia*, Cablecom-General, Inc. which is primarily engaged in cable television operations, and Frontier Airlines, which is primarily engaged in providing airline service.

[7] During the period 1960-1970, General Tire purchased greater than $1 million worth of products in at least one year from 78 different companies. (I.D. para. 267.) During the years 1961-1966, Aerojet purchased at least $100,000 during one year from each of 103 suppliers. (I.D. note 45.)

leverage for increasing General Tire's business. (I.D. para. 274.) The desired end result was to facilitate and implement "reciprocal trade practices." |I.D. para. 379.) In other words, these practices involved an effort by the General Tire organization to use business given *by* the General Tire organization as a basis for increasing the purchase of business *from* the General Tire organization.[8] Ragsdale worked in coordination with the traffic and purchasing department of General Tire and the trade relations personnel of its subsidiaries, including RKO. In an effort to secure business for General Tire, Ragsdale contacted both General Tire's existing suppliers as well as those companies with whom General Tire did not at that time have a business relationship. (I.D. para. 274.)

12. RKO did not have a formal trade relations office or department, although Robert Wilke and Harry Trenner did operate in areas of trade relations on behalf of RKO. Wilke was hired by RKO in 1960 to serve as a "goodwill ambassador or missionary salesman." Because of his athletic background and through previous employment, Wilke had a wide acquaintanceship at the advertiser-client level and at advertising agencies. Essentially, his function at RKO was to make the initial contacts with advertising agencies and potential advertisers in order to sell RKO and General Tire institutionally. Regular RKO sales personnel thereafter conducted any resulting sales negotiations. Wilke adopted the title of Director of Corporate Relations. Upon creation of General Tire's trade relations division in 1961, Wilke was designated to act as RKO's liaison with Ragsdale. The two men were in frequent contact by mail and telephone. (I.D. para. 275.)

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[8] A "reciprocal trade practice" or "reciprocal dealing" was defined by the Judge as an agreement whereby each party to the arrangement was both a supplier and a purchaser of goods and services. A transaction meeting these criteria would be considered a "reciprocal dealing" without regard to the nature of the factors which prompted the parties to enter into the agreement. (I.D. para. 379.)

13. In March, 1967, the Department of Justice filed a civil action against General Tire and certain of its subsidiaries, including RKO, alleging violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2), arising out of the defendants' alleged systematic use of their purchases to increase sales.[9] In this regard, General Tire and its subsidiaries were accused, *inter alia*, of conspiring to "persuade and coerce" their suppliers to purchase products and services from them, including advertising time on RKO stations. The suit was terminated on October 21, 1970, by a court-approved consent decree which is applicable for a period of ten years. The consent decree, *inter alia:* (1) precludes General Tire (including its subsidiaries) from conditioning its purchase of goods or services from any person upon General Tire's sales to that person; (2) prohibits General Tire from discussing with its customers the relationship between their mutual purchases and sales; and 3) requires the abolition of the positions of Director of Trade Relations at General Tire and Director of Corporate Relations at RKO. Thousands of documents supplied to the Justice Department by General Tire and third parties during the extended pretrial discovery phase of the antitrust suit were made available to the parties in the instant proceeding.

14. Evidence was adduced at hearing concerning specific instances in which reciprocal trade practices allegedly played a role in the conduct of business of General Tire and its subsidiaries with 171 companies. With respect to 46 of these firms, the Judge made a summary finding that the record failed to establish that they had reciprocal relationships with General Tire. (I.D. para. 363.) Of the remaining 125 companies, trucking was the industry most heavily represented with 51 firms involved.

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[9] *United States* v. *The General Tire & Rubber Company, Aerojet-General Corporation, A. M. Byers Company* and *RKO General Incorporated,* C.A. No. C-67-155 (N.D. Ohio, E. Div., Filed March 2, 1967).

In this regard, the Judge found that during the 1960-1967 time period General Tire, as a practice, favored with its freight business those trucking companies which utilized its products. (I.D. para. 269.) The Judge further found that General Tire took measures to withhold, reduce, or eliminate entirely its freight business with nine trucking companies which did not make sufficient purchases of General Tire's products. With respect to one of these instances, the Judge's findings indicate that the trucking company was also actively soliciting freight business on the basis of its tire purchases from General Tire; in all of the other eight cases, the Judge's findings show General Tire to be acting unilaterally against the trucking companies. (I.D. paras. 280-285.)

15. The Judge made additional detailed findings regarding General Tire's trade relations with 27 companies from a variety of fields outside the trucking industry. These findings reveal that in a number of instances General Tire's activity involved the reduction or curtailment of business with the other company, as well as explicit or implicit threats to do so. (I.D. paras. 289, 290, 294, 305, 324, 325, 328.) In some cases General Tire increased its sales of tires after applying pressure based on the amount of business General Tire was giving to certain companies. (I.D. paras. 321, 346, 360.) And in other cases, General Tire and RKO officials, working in concert, directly pressured companies to place advertising on RKO stations in order to reciprocate for business provided by General Tire. (I.D. paras. 321, 330.)

16. The Judge concluded that General Tire and its subsidiaries had engaged in reciprocal dealings. However, he felt that such practices should not reflect adversely upon RKO's qualifications.[10] (I.D. paras. 378-

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[10] The Judge noted that the Boston proceeding explored all phases of General Tire's program of reciprocal dealings, whereas the Los Angeles proceeding (involving RKO's application for renewal for Station KHJ-TV) was limited to an inquiry into matters which

380.) Although there was evidence to demonstrate otherwise, the Judge viewed General Tire's reciprocal trade activities as proper—"service, price and quality being equal—they preferred doing business with their friends."[11] (I.D. para. 380.) For example:

(1) Although there was no evidence of other reciprocal dealings in the broadcast industry, the ALJ believed reciprocal dealings to be acceptable since they were a common business practice in other industries. (I.D. para. 379.)

(2) Although there was evidence indicating otherwise, the ALJ stated that RKO had not engaged in coercive reciprocal practices. (I.D. paras. 379, 380.)

(3) The Judge viewed the relevant legal and economic antitrust concepts as being in a state of flux at the time General Tire's reciprocal dealings occurred. Accordingly, he felt that there was no certainty at the time of their occurrence that General Tire's trade relations practices were improper. (I.D. para. 379.)

(4) The Judge found that General Tire had taken positive steps in addition to those specified by the court to assure continuing compliance with the consent decree. (I.D. para. 380.)

(5) Although the record indicated otherwise, the ALJ stated that RKO had an "unblemished" record as

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directly involved RKO's operation of Station KHJ-TV. (I.D. para. 365.) In the Los Angeles proceeding, the Commission concluded that General Tire's and RKO's reciprocal dealings with respect to KHJ-TV should not reflect adversely upon RKO's operation of KHJ-TV. 44 FCC 2d 123, 129-130 (1973). In the Boston proceeding, the Judge concluded that none of RKO's witnesses in the KHJ-TV proceeding misrepresented or concealed facts or were lacking in candor concerning the reciprocal trade issue. (I.D. para. 383).

[11] On this and other matters, our bases for rejecting certain findings of the ALJ are discussed below.

a broadcaster; the ALJ also found RKO to be a pioneer in the broadcast industry. (I.D. para. 380.)

2. *The "Della Reese" Issue*

17. This issue was specified to determine whether RKO violated the sponsorship identification provisions of Section 317 of the Communications Act[12] and Section 73.654 of the Commission's Rules[13] with respect to the broadcast of the "Della Reese" program, a series of 193 one-hour variety entertainment shows produced in Hollywood by RKO for syndication.[14] The Judge found that, in connection with the production of 29 of these programs, a portion of the cost of the appearance of various musical acts was borne by record companies pursuant to a customary record industry practice of promoting their performers by paying for television exposure. In an estimated 28 other instances such partial reimbursement of production costs was promised but never paid. The Judge concluded that announcements of reimbursement should

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[12] 47 U.S.C. § 317.

[13] 47 C.F.R. § 73.654.

[14] Section 508 of the Communications Act, 47 U.S.C. § 508, requires producers of programs who receive money or other valuable consideration for the inclusion of matter in a program to report such consideration to the licensee or licensees over whose facilities the program is to be broadcast. The licensee is then required by Section 317 of the Act to announce that the matter contained in the program is paid for and to disclose the identity of the person furnishing the money or other valuable consideration. Where the performing artist, either personally or through his agent, makes a payment to producer to reimburse the producer for the fee paid to the artist, the fact that such payment was made must be disclosed by the producer to the television licensee and must be disclosed to the public in accordance with Section 73.654 of the Commission's Rules. There is no distinction between payments made and payments promised. (I.D. para. 381.)

have been but were not made on 40 of the approximately 57 programs.[15] (I.D. paras. 239, 240, 382.)

18. The ALJ found that RKO had an established policy for complying with its sponsorship identification obligations. That policy delegated to a program's executive producer the responsibility for broadcasting the required sponsorship identification announcements. Although the record showed that RKO had provided the executive producer of the Della Reese programs with some guidance in fulfilling his duties, the Judge found that RKO senior officials had not monitored the programs or otherwise checked to determine whether their directions were being carried out. The Judge concluded that this total reliance on the producer was unjustified. Although there was no showing that there had been an intentional violation of the Communications Act and the Commission's Rules or that RKO had benefited from the violations, the Judge accorded RKO a moderate comparative demerit for its breakdown in supervision. (I.D. para. 382.)

B. *Petition To Reopen The Record And Enlarge Issues*

19. In order to understand the next significant procedural stage of this proceeding, it is necessary to refer briefly to developments outside the Commission.

1. *SEC Inquiry Into General Tire Misconduct*

20. As the record later disclosed, General Tire officials knew that the company and its affiliates for many years had engaged in improper conduct. For example, M. G. O'Neill, General Tire's president and a member of its board of directors, initiated and participated in schemes to make political contributions which he knew or should

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[15] The Judge concluded that the failure to include an announcement also involved a violation of Section 508 of the Communications Act by RKO as a producer. (I.D. para. 382.)

have known were improper.[16] M. G. O'Neil was also responsible for maintaining certain illegal secret accounts, including one in Liechtenstein known as Fructal Finanz Anstalt (Fructal).[17]

21. By 1975 some of this and other misconduct attracted the attention of the Securities and Exchange Commission. In May 1975, Tress E. Pittenger, Vice-President and former General Counsel of General Tire, responded to an informal inquiry from the Division of Enforcement (Enforcement Division) of the SEC concerning General Tire's use of the secret Fructal bank account with respect to operations of General Tire's affiliate in Chile (INSA).[18] Pittenger gave the SEC a copy of a report which General Tire had prepared on the matter. At least two subsequent conferences between Pittenger and the staff of the Enforcement Division were held during the summer of 1975. At these meetings Pittenger supplied further information requested.[19] On December 5, 1975, the Enforcement Division wrote Pitten-

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[16] Report of the Special Review Committee of the Board of Directors of the General Tire & Rubber Company (Special Report), July 1, 1977, at 2. The Special Report was submitted to the Commission in July 1977 and formally admitted into the record by Order dated July 20, 1979. FCC 79-453.

[17] Special Report at 7, 18, 197.

[18] From March, 1974 and well into 1975, the management of General Tire became progressively active in connection with serious problems involving Industria Nacional de Neumaticos, S.A. (INSA), its Chilean tire manufacturing affiliate. The problems concerned General Tire's alleged overbilling of INSA and General Tire's use of the secret Fructal bank account to disguise receipt of the overbilling. Extensive meetings were held in Akron in 1974, and Tress E. Pittenger made several trips to Chile. In March, 1975, General Tire filed a detailed and documented position paper with the Chilean central bank (Banco Central) in Santiago supplementing a preliminary oral report made in December, 1974. The matter received wide publicity in the news media in Chile. Special Report at 29-30.

[19] Special Report at 30.

ger asking for the following information at the earliest possible date for the period commencing January 1, 1970:

(1) The names and addresses of all persons, groups, or entities employed by, affiliated with or representing, directly or indirectly, any foreign government to whom General Tire, its subsidiaries, representatives, or other persons acting on its behalf, have paid money or other emoluments, or entered into any contracts or agreements to pay such which are, in the aggregate, in the excess of $1,000 in any fiscal year. Please specify the date, amount, and purpose of each such payments and indicate the accounting treatment accorded to any such item in the financial statements of General Tire or its subsidiaries; and,

(2) The names and addresses of all government officials, political parties, campaign committees or other individuals and groups to whom General Tire or any of its subsidiaries have made political contributions, directly or indirectly, from corporate funds. Please specify the date and amount of each such payment and indicate the accounting treatment accorded to any such item in the financial statements of General Tire or its subsidiaries.[20] Pittenger responded by letter dated December 11, 1975, that he would make "the necessary detailed investigation." [21]

2. *Community's Petition*

22. Meanwhile, on December 10, 1975 (subsequent to the Initial Decision but prior to oral argument before the Commission *en banc*) Community filed a petition to reopen the record, enlarge the issues, and remand for further hearing. Attached to Community's petition were

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[20] *Id.*

[21] *Id.* at 31.

three volumes of exhibits totalling 640 pages. Community stated that it had discovered evidence demonstrating that General Tire had engaged in "illegal, unethical and improper conduct in the United States of America and in foreign countries." [22] Community alleged that General Tire had engaged in illegal bribery of foreign public officials, had established secret accounts to evade banking and tax codes of foreign countries, and had defrauded the stockholders of its own subsidiaries by misappropriating corporate funds. Community further alleged that these activities violated securities and tax laws. Community submitted that these activities reflected a corporate policy initiated, encouraged and approved by top General Tire management, "the very individuals who legally control RKO policy and, ultimately WNAC-TV." [23] Community also accused General Tire and RKO of attempting "to conceal, mislead and deceive" the public, General Tire stockholders and various public agencies (including the Federal Communications Commission) by failing to disclose material information in their possession and/or by publicly claiming ignorance of known facts.[24] Additionally, Community alleged that RKO (1) had violated Section 1.514 of the Commission's rules by failing to disclose General Tire's secret interest in Fructal,[25] (2) had violated Section 1.65 of the rules by failing to disclose that General Tire's corporate activities were being investigated at the direction of the Chilean government and by failing to disclose the legal violations themselves,[26] and (3) had exhibited a lack of candor by failing to disclose information in its possession relating to the documented fraud and corruption.

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[22] Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearing (Petition to Reopen), December 10, 1975, at 5.

[23] *Id.* at 5-6.

[24] *Id.* at 4, 21-22.

[25] Section 1.514(a) of the Commission's rules (now Section 73.3514(a) (47 C.F.R. § 73.3514(a))), states, in pertinent part: "Each application shall include all information called for by the particular form on which the application is required to be filed." In this case, Community alleged that RKO had failed to include in its renewal application information concerning General Tire's interest in Fructal.

23. RKO sought and obtained from the Commission an extension of time to respond to Community's petition in order "to verify translated documents" contained in Community's pleading and to consult with "persons who may have knowledge of the pertinent facts." [27] on January 21, 1976, RKO submitted its "Opposition" to Community's petition. RKO stated that there was "no factual or legal foundation for [Community's] pyramid of charges" [28] and that "the charges [of violating SEC and tax laws] . . . are groundless." [29] RKO also claimed that Community's charges were "essentially unsupported and that sensationalism and blatant exaggeration [were] rampant." [30] RKO asserted that Community's petition failed to comply with Section 1.229 of the Commission's rules which requires that reliable support be provided for allegations of fact; [31] RKO noted that Community's allegations of illegal and improper conduct were not supported with affidavits of

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[26] Section 1.65 of the Commission's rules, 47 C.F.R. § 1.65, provides, in pertinent part:

> "Whenever there has been a substantial change as to any . . . matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate."

[27] RKO Motion for Extension of Time, December 12, 1975, at 2-3.

[28] RKO Opposition to the Petition to Reopen the Record, Enlarge Issues, and Remand for Further Hearing (RKO Oposition), January 21, 1976, at 5.

[29] *Id.* at 17.

[30] *Id.* at 5.

[31] *Id.* at 7; 47 C.F.R. § 1.229.

persons with personal knowledge of the facts. Thus, RKO concluded, Community had "wholly failed to support, much less show a substantial likelihood of proving any of its broad-scale allegations that General Tire had engaged in fraud, bribery, illegal political payments or in any violation of disclosure requirements." [32] RKO categorized Community's request for discovery as a "fishing expedition", adding that there was no need for a Commission inquiry.[33] RKO also noted gratuitously that Community had failed to "assert any improper political contributions by General Tire in the United States." [34] On these bases RKO argued that there was no merit to Community's charges that RKO had failed to disclose information in violation of Sections 1.514 and 1.65 of the Commission's rules. With respect to the alleged Section 1.514 violation, RKO explained that Fructal was not a business but instead was an incorporated bank account under the laws of Liechtenstein. Even assuming Fructal could be considered a business, RKO contended, it was a part of INSA's business of manufacturing tires and tubes. Thus, in disclosing General Tire's interest in INSA, RKO had satisfied its responsibilities under Rule 1.514.[35] RKO concluded that, even if wrongdoing were established, it would not constitute serious misconduct of the kind which would reflect adversely upon RKO's qualifications or its probable future conduct as a broadcast licensee.[36] At no point in its pleading did RKO advise the Commission of the SEC inquiry.

3. Further SEC Inquiries

24. When RKO filed its Opposition to Community's petition, General Tire had not yet responded to the SEC

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[32] RKO Opposition at 23.

[33] *Id.* at 9-10.

[34] *Id.* at 5.

[35] *Id.* at 33-34.

[36] *Id.* at 24.

letter of December 5, 1975. On January 23, 1976—two days after RKO filed its opposition to Community's petition—the General Tire board of directors, headed by T. F. O'Neil (who was then, as now, Chairman of RKO's board), met and was formally advised of the SEC's letter of December 5, 1975, concerning misconduct by General Tire. The board appointed a special committee to investigate the matter. The special committee consisted of two non-management directors and was to rely on General Tire's in-house counsel.[37]

25. Meanwhile, on January 22, 1976, the Enforcement Division wrote to General Tire again. This time it set out eleven areas of inquiry upon which it desired information, including documents. In addition to extensive inquiry on particular points concerning operations in Chile, this letter raised questions about General Tire's activities in Morocco and Rumania and inquired into General Tire's so-called "611" accounts.[38] On February 10, February 19, February 24, and March 1, 1976, substantial submissions were made by General Tire to the SEC in response to its letter of January 22.[39]

26. On February 3, 1976, General Tire officials met with SEC staff members from both the Corporation Finance and the Enforcement Divisions. Present for General Tire were Pittenger, John H. Dalton, general counsel, and attorneys from a New York City law firm who were acting as outside counsel. From General Tire's point of view, the purpose of the meeting was to determine what it would be required to put in the statement to be used to solicit proxies for the 1976 annual meeting of sharehold-

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[37] Special Report at 31.

[38] These "611" accounts turned out to be secret bank accounts by which General Tire transferred monies to be used for and/or in response to improper transactions. See para. 132, *infra*.

[39] Special Report at 31.

ers.[40] Sharp, sarcastic statements were made by Pittenger, who at one point advised an Enforcement Division staff member against holding his breath while waiting for submission of additional material because "you'll turn blue." [41] Furthermore, a misunderstanding appears to have arisen as to whether Pittenger was candid in answering a staff question inquiring if General Tire had a problem involving domestic political contributions.[42]

27. On February 13, 1976, General Tire delivered a lengthy letter to the SEC. The letter detailed several problems which had come to light, including removal of General Tire from the Arab boycott list.[43]

28. In the latter part of February, 1976, the SEC issued a formal order of investigation against the General Tire organization. At least eight depositions were taken in that investigation, including that of General Tire President, M. G. O'Neil. In addition, the SEC served an extensive *subpoena duces tecum* upon General Tire which was received March 10, 1976. Meanwhile, at its meeting of March 3, 1976, the General Tire board of directors enlarged the special committee appointed in January to include all five outside directors and retained General Tire's regular outside counsel and independent accountants to assist the expanded committee in discharging its duties.[44]

29. Negotiations were held between General Tire officials and the SEC concerning the form and extent of relief required by the SEC.[45] On May 10, 1976, the SEC filed a Complaint for Injunctive and Certain Ancillary Relief against General Tire and M. G. O'Neil (SEC Com-

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[40] *Id.*

[41] *Id.* at 32.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

plaint). The SEC charged General Tire and O'Neil with numerous violations of the Securities Exchange Act of 1934 and SEC rules.[46] As part of this misconduct, the SEC Complaint alleged the following:

> [S]ubstantial improper and illegal payments totalling in excess of several million dollars of corporate funds were made; domestic political contributions and improper payments to officials and employees of various governments were effected; the corporate books and records of General Tire were falsified and certain funds were maintained and not reflected on the corporate accounts of General Tire; violations of foreign currency laws occurred; [and] materially false and misleading annual and periodic reports and proxy statements were filed with the [Securities and Exchange] Commission.[47]

The SEC Complaint recited substantially all of the allegations made by Community in its December 10, 1975, petition and added others (*e.g.*, illegal and improper domestic political contributions).

30. On the same day the SEC Complaint was filed (May 10, 1976), the court approved a negotiated final judgment of permanent injunction incorporating the consent and undertaking of General Tire and the consent of M. G. O'Neil.[48] The permanent injunction prohibits the

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[46] *SEC* v. *The General Tire and Rubber Company and Michael Gerald O'Neil*, No. 76-0799 (D.D.C., consent injunction filed May 10, 1976). General Tire and M. G. O'Neil were charged with violations of Sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78j(b), 78m(a) and 78n(a)] and Rules 10b-5, 13a-1, 13a-13 and 14a-9 [17 C.F.R. §§ 240.10b-5, 240.13a-1, 240.13a-13, and 240.14a-9]. See Special Report, Appendix A at 1-2.

[47] First Cause of Action of SEC Complaint. See Special Report, Appendix A at 4.

[48] Final Judgment of Permanent Injunction against the General Tire & Rubber Company and Michael Gerald O'Neil (Final Judgment). See Special Report, Appendix D.

concealment of any of the misconduct alleged in the SEC Complaint including, *inter alia*, unlawful political contributions, unlawful payments to foreign government officials and the overbilling of affiliates and subsidiaries.[49] The consent decree entered into by General Tire and M. G. O'Neil did not admit or deny any of the allegations in the SEC Complaint.[50] It did provide, however, for the creation of a Special Review Committee, composed of five nonmanagement members of General Tire's board of directors, assisted by Special Counsel, whose purpose was to conduct an

> extensive investigation into the use of corporate funds for unlawful political contributions; . . . the use of corporate funds for improper payments to governmental employees and officials, foreign or domestic; the establishment and maintenance of, and transactions in, any secret or unrecorded funds; . . . and such other similar matters as may be revealed during the course of the investigation.[51]

The Review Committee was required to submit a written report for consideration by General Tire's board of directors and to file the report with the SEC as well as the court. The court retained jurisdiction of the matter for all purposes, including enforcing General Tire's compliance with the decree.

31. On May 14, 1976, RKO advised the Commission of the SEC inquiry and the court-approved consent decree.[52]

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[49] Final Judgment. See Special Report, Appendix D at 2-4.

[50] Consent and Undertaking of the General Tire & Rubber Company (General Tire Consent and Undertaking). See Special Report, Appendix B at 1. Consent of Michael Gerald O'Neil. See Special Report, Appendix C at 1.

[51] General Tire Consent and Undertaking. See Special Report, Appendix B at 2-3.

[52] RKO Statement for the Information of the Commission, May 14, 1976. RKO promised that the report of the Special Review Committee would be provided to the Commission upon its completion.

This was the first time that the Commission was notified by RKO that the SEC was investigating possible misconduct by the General Tire organization.

4. Further Commission Proceedings

32. On June 18, 1976, Community supplemented its December 10, 1975, Petition to Reopen. The supplement cited the above described SEC complaint, which was said to be based on sworn testimony and documentation available at the SEC. In light of the allegations contained in the SEC Complaint, which were wider in scope than those allegations initially made by Community, the supplement requested that five additional issues be designated against RKO.

33. In the meantime, the parties had already submitted exceptions to the ALJ's findings. On June 29, 1976, oral argument was held before the Commission, *en banc*, concerning the Initial Decision and those exceptions. Following oral argument the Commission determined that it would be inappropriate to take any action until after the submission of the report by General Tire's Special Review Committee.[53]

C. *Proposed Transfer of RKO*

34. On September 21, 1976, RKO filed an application proposing to transfer *de jure* control of RKO from General Tire to the latter corporation's individual stockholders. By Memorandum Opinion and Order this proposal was placed in a deferred status pending consideration of

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[53] Also on June 29, 1976, a Motion for Leave To File as Amici Curiae was filed with the Commission by the National Citizens Committee for Broadcasting (NCCB) and the Friars of the Atonement (Friars). The Amici concluded that the renewal application of RKO should be denied on the basis of the SEC Complaint. Comments and an Opposition were filed by the Broadcast Bureau and RKO, respectively, on July 6, 1976.

the allegations against RKO and General Tire in this proceeding.[54]

D. *Petition To Comply With Section 1.65*

35. Another matter in issue in this proceeding concerns RKO's annual financial reports, which are contained on Form 324. In 1972, the Commission issued a Public Notice that reminded all broadcasters of the requirement to include in their 324 Forms a report on the income and expense involved in "barter and trade" transactions.[55] As the record later disclosed, RKO's 324 Forms for 1972-1976, inclusive, did not fully and accurately report data as to RKO barter and trade transactions.[56] Moreover, the record discloses that RKO officials knew at the time the reports were filed that the 324 Forms did not fully and accurately report such items.[57]

36. On April 7, 1977, Community filed a "Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules" (Petition to Comply).[58] Community requested that the Commission order RKO to file notice as to whether it had violated the Commission's rules regarding the reporting of trade and barter transactions, and, if so, promptly to furnish details

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[54] 64 FCC 2d 713 (1977).

[55] *In re Reporting "Trade Outs" on FCC Broadcast Financial Reports*, 34 FCC 2d 439 (1972). A "barter and trade" transaction involves the exchange of advertising time for consideration other than normal advertising fees. This transaction is made usually because the broadcaster determines that the advertising time will remain unsold unless special measures are taken; usually the time is exchanged for the advertiser's goods or services, e.g., a car, a hotel room, clothes. The Commission amended its 324 Forms in November 1972 to include a line (now 20) for reporting barter and trade revenue.

[56] See paras. 165-181, *infra*.

[57] *Id.*

[58] See note 26, *supra*, for the appropriate language of Section 1.65.

of any such violations. The petition was based on the following excerpt from General Tire's 1976 Annual Report to shareholders (dated February 24, 1977): "such [barter and trade] transactions . . . were generally accounted for on a memoranda basis, although the records for such transactions are in a number of instances not now complete."[59] Noting the above language, plus the fact that RKO's accounting practices for barter and trade transactions were then under review by the Special Review Committee, Community suggested that RKO very probably had not properly reported all of its barter and trade transactions to the Commission on its Form 324 reports. If RKO had failed to report all of its barter and trade transactions, Community argued that RKO was in violation of the Commission's rules. Community asked the Commission to require RKO under Section 1.65 to correct any inaccuracies in its Form 324 Reports.

37. RKO's April 18, 1977, response opposed Community's petition. RKO claimed that Community had not alleged any specific inaccuracies in RKO's Form 324 Reports. Thus, RKO argued, Community had indulged in "sheer speculation" in assuming that RKO did not fully and accurately report its barter and trade transactions.[60] RKO further contended that it was immaterial whether the records of RKO's pre-1976 barter and trade transactions were complete since Community had "made no showing whatsoever impugning the completeness of the information available to RKO at the time the Form 324's were filed, or as to the accuracy of the financial information that RKO reported to the Commission."[61] In general, RKO accused Community of seeking a "harassing and

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[59] Petition to Comply at 2.

[60] RKO Opposition to Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules (RKO Opposition II), April 18, 1977, at 2.

[61] *Id.* at 2-3.

administratively disruptive 'fishing expedition.'"[62] However, RKO did promise to provide the Commission with the report of the Special Review Committee when it was completed.[63]

E. *The Special Report*

38. The Special Report was issued on or about July 1, 1977. RKO filed a copy of the Special Report with the Commission on July 19, 1977. In general, the Special Report confirmed most of the allegations contained in Community's two petitions. The Special Report covered "the main categories of allegations made in the complaint filed by the SEC, and also other matters developed by the Special Review Committee in the course of its investigation."[64] Among the Special Report's many conclusions are the following: (a) General Tire and certain of its subsidiaries engaged in various schemes and practices that resulted in improper domestic political contributions; (b) Aerojet, an RKO subsidiary, gave gratuities to military and other government-connected personnel having dealings with Aerojet; (c) General Tire and its affiliates maintained and used improper secret and unrecorded funds designed to avoid foreign currency exchange and tax laws; (d) General Tire and its affiliates paid bribes to foreign agents and officials not only to do business in a country but also to keep competitors out; (e) through the use of secret bank accounts, General Tire systematically overbilled its foreign affiliates; and (f) RKO did not maintain adequate records concerning the amount or use of consideration resulting from its barter and trade transactions.[65]

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[62] *Id.* at 5.

[63] *Id.* at 3 n.*.

[64] Special Report at 1.

[65] A summary of the Special Report's findings is contained on pages 2-17 of the Report.

F. *Joint Petition for Approval of Agreement*

39. On April 19, 1978, before the Commission could consider these pending pleadings, RKO, Community and Dudley entered into a settlement agreement calling for the assignment of the license for station WNAC-TV to New England Television Corporation (NETV), an entity created by a merger of Community and Dudley. On August 30, 1978, the parties submitted a "Joint Petition for Approval of Agreement" as well as an appropriate assignment application contemplating the assignment of the WNAC-TV license to NETV for a purchase price of $54,000,000. The settlement agreement was made subject to certain conditions, including (1) a Commission decision affirming the favorable conclusions of the ALJ as to the basic qualifications issues designated against RKO; (2) a Commission grant of RKO's renewal application for WNAC-TV; (3) a Commission holding that RKO possesses the requisite qualifications to be a broadcast licensee; and (4) the issuance of a tax certificate pursuant to Section 1071 of the Internal Revenue Code [66] for the sale of WNAC-TV.

40. On October 6, 1978, petitions to deny the WNAC-TV assignment were filed by Fidelity Television, Inc. (Fidelity) and Multi-State Communications, Inc. (Multi-State).[67] Fidelity is a competing applicant for KHJ-TV, Los Angeles, which is currently operated by RKO; Multi-State is a competing applicant for WOR-TV, New York, which is currently operated by RKO. Since both of those latter proceedings had been conditioned on the outcome of the Boston case,[68] Fidelity and Multi-State claimed stand-

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[66] 26 U.S.C. § 1071.

[67] Fidelity Petition to Deny Assignment Application and Comments on "Joint Petition for Approval of Agreement" (Petition to Deny), October 6, 1978; Multi-State Petition Pursuant to Section 1.580(i) (Petition), October 6, 1978.

[68] See paras. 46, 47, 49 and 50, *infra*.

ing to attack the assignment application for WNAC-TV. Both parties in essence urged the Commission to avoid taking any action which would prejudice their rights against RKO in their respective proceedings. Fidelity argued that the information in the Special Report cast grave doubt on RKO's basic and comparative qualifications to be a Commission licensee. Consequently, Fidelity contended, further hearings were required before RKO's renewal and assignment applications could be granted.[69] Multi-State added that the non-adversarial posture of the Boston proceeding no longer assured a critical examination of RKO's qualifications. Under these circumstances Multi-State said it would not consider itself bound by the findings to be made in the Boston proceeding.[70]

G. *Further Commission Proceedings*

41. On June 21, 1979, the Commission met in closed session to consider Community's Petition to Reopen and the Joint Petition for Approval of Agreement.[71] By Order released June 28, 1979 (FCC 79-403), the Commission directed the parties to file summaries of their positions and to present oral argument on the following questions:[72]

(1) Is the record in this proceeding sufficient for the Commission to make a judgment:

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[69] Fidelity Petition to Deny at 5-6.

[70] Multi-State Petition at 3-4. See also Multi-State Reply to Joint Opposition to Petitions to Deny, November 7, 1978, at 2-4.

[71] A "Joint Motion for Expeditious Disposition, Within Thirty Days, If Possible, To Comport With Minority Ownership Policies" was filed March 7, 1979, by NETV, Community and Dudley. This motion is hereby denied. Although this proceeding has been unusually protracted, these matters have been handled as expeditiously as possible consistent with the complexities of this particular case and the Commission's responsibilities to deal with other cases.

[72] Fidelity and Multi-State were invited to participate in this phase of the Boston proceeding.

(a) that RKO is qualified to remain the licensee of Station WNAC-TV, Boston, Massachusetts; or

(b) that RKO is not qualified to remain the licensee of Station WNAC-TV, Boston, Massachusetts?

(2) In the event that the record is sufficient to make either of the above judgments, what should that judgment be?

42. Summaries of the parties' positions were filed on July 9, 1979, by RKO, Community, Dudley, NETV, Fidelity, Multi-State and the Broadcast Bureau.

43. Oral argument was conducted on July 18, 1979, before the Commission, *en banc.* Following oral argument the Commission concluded that, on the basis of the record at that point, it could not find RKO qualified to remain a broadcast licensee. At the same time the Commission decided that it wanted further information from the parties before it could decide what action should be taken in the case. Accordingly, by Order released July 20, 1979 (FCC 79-453), the Commission directed that the parties file responses to address the following matters:

(1) RKO General, Inc. (RKO) should make a particularized proffer of specific evidence that it would introduce, if given the opportunity, to mitigate the findings and conclusions of the "Special Report". The proffer must be supported in all respects by affidavits from persons with personal knowledge of the facts alleged.

(2) All parties should submit proposed findings of fact and conclusions of law regarding the matters set forth in the "Special Report". If a party believes that the Commission should consider any other evidence (exclusive of the mitigating evidence referred to in paragraph (1) *supra*) that is not part of the

record in this proceeding, that party should make a particularized proffer of specific evidence that it would introduce, if given the opportunity, and should also indicate what conclusions the Commission should draw from such evidence. Any references to facts outside the record must be supported in all material respects by affidavits from persons with personal knowledge of the facts alleged.

(3) All parties should submit proposed findings of fact and conclusions of law regarding the nature of the relationship between GTR [General Tire] and RKO (including their officers, directors, and employees) and the implications of such a relationship in evaluating the matters set forth in the Special Report. These proposed findings of fact and conclusions of law may be based on the entire record of this proceeding (including the Special Report) and on any matter of which the Commission may take official notice. If a party believes that the Commission should consider any other evidence regarding the GTR-RKO relationship that is not a part of the record in this proceeding, that party should make a particularized proffer of specific evidence that it would introduce, if given the opportunity, and should also indicate what conclusions the Commission should draw from such evidence. Any references to facts outside the record must be supported in all material respects by affidavits from persons with personal knowledge of the facts alleged.[73]

44. In the same July 20, 1979, Order, the Commission reopened the record for the purpose of accepting into evidence the Special Report, and Multi-State was formally made a party for these further proceedings (Fidelity was

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[73] July 20, 1979 Order (FCC 79-453) at 2-3.

already a party).[74] In response to the Commission's request, all of the parties, including Multi-State and Fidelity, filed findings of fact and conclusions of law and reply pleadings.[75] Based on these latest submissions, the Special Report, the pleadings previously filed by the parties, and all aspects of the evidentiary record,[76] this matter is now ripe for decision.[77]

II. *Discussion*

45. Based on the record before us we are compelled to find that RKO does not possess the requisite qualifications to be a broadcast licensee for Channel 7, Boston. Before discussing the merits of our decision, however, it is first necessary to dispose of some procedural matters.

A. *Preliminary Procedural Matters*

46. At the outset we must resolve questions raised by RKO concerning the status of Fidelity and Multi-State. To resolve this matter, reference must be made to the

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[74] *Id.* at 2.

[75] Proposed findings and conclusions were filed August 27, 1979, respectively by RKO, Community, Dudley, NETV, Fidelity, Multi-State and the Broadcast Bureau. Separate replies were filed September 24, 1979, by the same parties.

[76] It should be noted here that we have already taken official notice for this case of the record developed in the KHJ-TV proceeding. *RKO General, Inc.*, 20 FCC 2d 846, 848 (1969).

[77] On October 30, 1979, Hub Broadcasting, Inc. (HUB), filed a petition for leave to intervene in this proceeding. Oppositions to HUB's Petition were filed November 9, 1979, by RKO, NETV, Fidelity, Multi-State, and the Broadcast Bureau. An affidavit in support of its Opposition was also filed by NETV on November 14, 1979. HUB filed a Reply on November 21, 1979, a substitute page for its Reply on November 26, 1979, and certified copies of certain exhibits in support of its Reply on December 17, 1979.

relationship between the instant matter and the Los Angeles and New York comparative proceedings. The Los Angeles, Channel 9 comparative television proceeding (Docket Nos. 16679-80) involves RKO's application for renewal of its license for station KHJ-TV as well as the mutually exclusive application for a construction permit filed by Fidelity. The Los Angeles proceeding was first designated for hearing on June 8, 1966.[78] The Commission ultimately granted KHJ-TV's renewal application but expressly conditioned that action on the final outcome of the Boston proceeding. At the same time, Fidelity was made a party to the Boston proceeding, with its participation limited to matters pertaining to RKO's anticompetitive practices and a related lack of candor issue.[79]

47. The New York City, Channel 9 comparative television proceeding (Docket Nos. 19991-2) involves RKO's application for renewal of its license for station WOR-TV and the mutually exclusive application for a construction permit filed by Multi-State. In its designation Order [80] the Commission specified the same disqualification issues then pending against RKO in the Boston proceeding and stated that resolution of these issues in the Boston proceeding would be *res judicata* as to RKO in the New York proceeding.[81]

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[78] A detailed account of the history of the KHJ-TV case can be found in *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974).

[79] 31 FCC 2d 70, 74 (1971); 44 FCC 2d 123, 137-138 (1973). The Court of Appeals' affirmance of the Commission's decision in the Los Angeles proceeding was similarly conditioned on the final resolution of the Boston proceeding. *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, 698 n. 26, 703 n. 45, *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[80] 46 FCC 2d 246, 249 (1974).

[81] In the New York proceeding, questions were also raised concerning Multi-State's financial condition. That proceeding was ulti-

48. RKO, Community, Dudley and NETV (joint parties) oppose the participation of Fidelity and Multi-State in the current phase of the Boston proceeding. They argue that Fidelity's and Multi-State's interests rest solely on those basic qualifications issues previously designated. Accordingly, they argue, there is no reason for Fidelity and Multi-State to participate with respect to the Special Report or the Joint Agreement.

49. We disagree with the joint parties. Multi-State and Fidelity must be accorded status as parties to the extent this proceeding concerns RKO's basic qualifications. Both Fidelity and Multi-State have a clear, substantial interest in the outcome of the Boston proceeding. The character issues originally specified against RKO dealt only with sponsorship identification and reciprocal trade practices. However, the same reasoning which led the Commission to allow Fidelity and Multi-State to participate as to those issues applies to the matters under consideration as a result of the SEC investigation, since these matters also bear upon RKO's basic qualifications. Moreover, it is quite

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mately bifurcated to permit an accelerated hearing on the financial issue. After adducing evidence on this question, then Chief Administrative Law Judge Chester F. Naumowicz, Jr. concluded that Multi-State was financially unqualified, FCC 74D-63, 61 FCC 2d 1070 (1974). The Commission affirmed, 61 FCC 2d 1062 (1976), denied reconsideration, 64 FCC 2d 869 (1977), and ordered the hearing to proceed solely on the issues directed to RKO's renewal application. Subsequently, Judge Naumowicz found RKO qualified and recommended renewal of RKO's license, against subject to the Commission's action in the Boston proceeding, FCC 76D-70, released January 4, 1977. This recommendation was subsequently adopted by the Commission, 69 FCC 2d 461, 470 (1978). Multi-State, in turn, appealed the Commission's determination that it was financially unqualified. The court reversed the Commission's determination and remanded the case to the Commission for further disposition. *Multi-State Communications, Inc.* v. *FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

clear that a Commission determination that RKO is qualified in all respects to be a Commission licensee—a determination requested by the joint parties—would have a significant impact on the Los Angeles and New York proceedings. Hence, fairness requires that Fidelity and Multi-State have an opportunity to participate in the Boston case to the extent it concerns RKO's qualifications. Our conclusion is buttressed by the court's statement that the Commission's decision in the Boston proceeding "and the agency's interpretation of it in deciding whether to revoke RKO's license for KHJ will of course constitute an appealable order of the Commission, which may then be appealed by either Fidelity or RKO." [82]

50. Multi-State is in a position similar to Fidelity's. Like Fidelity; Multi-State would be entitled to appeal any final Commission determination in the Boston proceeding which would have an adverse impact on its application in the New York case. This is so because the Commission has clearly stated that a finding in the Boston proceeding with respect to the issues designated as to RKO's basic qualifications would be *res judicata* in the New York proceeding.[83]

51. Two additional preliminary procedural matters remain. We will accept the amicus brief filed by NCCB and Friars. For the most part the brief duplicates the arguments made by Community and at the same time adds no new factors for Commission consideration. Acceptance of the brief, which is the limit of the amici's participation, will not complicate or lengthen this proceeding. Moreover, this is a brief prepared by a known spokesman of the

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[82] *Fidelity Television, Inc.* v. *FCC*, *supra*, 515 F.2d at 693 n. 13. We recognize that the court did not specifically consider developments subsequent to its decision, including the SEC complaint and preparation of the Special Report. However, the court made it plain that Fidelity had a right to participate in the Boston proceeding to the extent it concerned RKO's basic qualifications.

[83] 46 FCC 2d at 249.

public concerning an important broadcast matter.[84] At this time we will also deny the petition filed by HUB for leave to intervene in this proceeding. The Commission has rules which establish dates after which competing applications may not be filed.[85] These rules are designed to allow for the orderly disposition of competing application.[86] HUB suggests that the instant matter has "come into a blind alley" and that the Commission should open the door to new applicants for Channel 7 in Boston.[87] As the decision today discloses, this case has not reached a "blind alley." Nor has HUB provided any basis for participating in this proceeding in a capacity other than as a competing applicant. It is true that Community and Dudley propose to merge into a new corporation, NETV, and that this development may affect the willingness of those two parties to engage in an adversarial testing of each other's proposals. However, the Broadcast Bureau is also a party to this proceeding, and we feel confident that the Bureau can adequately represent the public interest in assuring a full development of the factual record and a proper presentation of all legal arguments. HUB has not indicated that it has special knowledge or expertise that would complement the Broadcast Bureau's efforts. In short, HUB has not provided any good cause that would justify a grant of its petition at this late juncture. 47 C.F.R. § 1.223(c).[88]

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[84] See e.g. *Service Electric Cable TV, Inc.*, 30 FCC 2d 831 (1971). In denying rehearing in *Fidelity Television* v. *FCC*, *supra*, 515 F.2d at 703, the Court of Appeals strongly intimated its endorsement of such amicus briefs before this agency.

[85] 47 C.F.R. § 1.227(b)(6).

[86] *Way of Life Television Network, Inc.*, 67 FCC 2d 90, 91 (1977), *reversed on other grounds*, *Way of Life Television Network, Inc.* v. *FCC*, 593 F.2d 1356 (D.C. Cir. 1979).

[87] HUB Petition for Leave to Intervene at 6.

[88] At the appropriate time, however, we will consider the substance of HUB's comments as they pertain to the qualifications of the remaining applicants for Channel 7 in Boston.

B. *Disqualification of RKO*

1. *Introduction*

52. In reviewing broadcast applications our objective is to obtain the best practicable service for the public. *See e.g. Plains Radio Broadcasting Company* v. *FCC*, 175 F.2d 359, 362 (D.C. Cir. 1949). To that end we must assure ourselves—and the public—that, if granted a broadcast license, an applicant will comply with applicable laws and Commission rules, be honest and forthcoming with the Commission and the public, and operate the station in a manner consistent with the public interest. The basis for imposing these requirements is fairly obvious. Broadcast facilities remain a limited public resource and should be made available only to parties who appreciate the importance of the privilege and will not abuse it. In this regard, it is important to bear in mind that the Commission has only limited resources itself to administer its responsibilities and to oversee the activities of approximately 9,000 broadcasters. Fulfillment of our responsibilities therefore requires us to place considerable reliance on the good faith and honesty of broadcasters. Our procedure for disposing of fairness doctrine complaints provides an apt illustration of how we rely on the truthfulness of broadcasters. If a complaint contends that a broadcaster has not adequately covered both sides of a controversial issue of public importance, we may, under certain circumstances, ask the broadcaster to identify programs it has broadcast or intends to broadcast with respect to that particular issue. In evaluating the broadcaster's response, we generally accept the truthfulness of the broadcaster's program descriptions; we do not conduct a field investigation or otherwise undertake additional proceedings to insure that the broadcaster is telling the truth. *See Fairness Report*, 48 FCC 2d 1, 17-21 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *affirmed in part and reversed in part on other grounds, NCCB* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). If we could not accept the truthfulness of broad-

caster representations here (and in other areas), it would unduly burden the administrative process and frustrate the implementation of the Communications Act.

53. In order to determine whether an applicant is in fact reliable we must make a judgment as to how that applicant will conduct itself in the future. The need to make that predictive judgment, in turn, requires us to investigate what has been denoted the applicant's "character." As the foregoing discussion should make clear, we do not undertake a character inquiry to pass moral judgment on a person's behavior or to punish past wrongs. We are authorized under Section 308 of the Communications Act [89] to establish character qualifications because of its relationship to broadcast operations. Hence, we look to the applicant's past conduct as a guide to how the applicant is likely to operate a broadcast station in the future. *Violation by Applicants of Laws of U.S. (1951 Policy Statement)*, 42 FCC 2d 399, 400 (1951) (reprint). *Cf. United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

54. There is of course no simple formula for predicting future conduct. In part, this is because individual behavior is too complex and too subject to change to be pigeonholed into rigid categories. Another difficulty is that, to some extent at least, virtually every case presents unique facts. For these reasons, questions of character qualifications must be examined on a case-by-case basis. *See Violation by Applicants of Laws of U.S., supra*, 42 FCC 2d at 402, 405. However, there are some basic factors which guide us in evaluating the impact of misconduct on an applicant's qualifications. Specifically, we consider any misconduct in light of the following questions:

(a) Does the misconduct relate to broadcast operations or to non-broadcast activities which indicate how the applicant will operate a broadcast station?

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[89] 47 U.S.C. § 308.

(b) Is the misconduct an isolated incident or does it reflect a pattern of misbehavior?

(c) How recently did the misconduct occur?

One further point should be made with respect to our consideration of nonbroadcast misconduct. As we explained in our 1951 Policy Statement, our evaluation is not controlled by the decision of any other forum. In other words, we might take cognizance of a violation or probable violation of a law other than the Communications Act even though the agency or forum responsible for enforcement of the other law has not entered any final judgment against the applicant.[90] Our decision in evaluating a broadcast application must be made on the basis of the facts before us and in light of the particular purposes to be served by the Communications Act. Only this agency has the experience and the responsibility to determine how certain behavior bears upon the operation of a broadcast facility. Other forums have different responsibilities. Another forum's decision whether to initiate a lawsuit or to make a finding against a party may and often does reflect a mix of factors which have nothing to do with implementation of the Communications Act. Accordingly, we must make our own independent judgment as to how the particular facts of any alleged misconduct bear upon the probable operation of a broadcast facility.

55. Application of the foregoing factors to the instant case requires us to disqualify RKO. To be sure, RKO has operated broadcast stations for a long time and has undertaken measures which are a credit to itself and the broadcast industry. Those credits, however, are far outweighed by the massive misconduct engaged in by RKO and its parent, General Tire, over a considerable number of years—misconduct, it should be emphasized, that often included an abuse of the broadcast facilities which RKO

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[90] *Violation by Applicants of Laws of U.S., supra,* 42 FCC 2d at 403. On the other hand, we would take appropriate cognizance of a final judgment by another forum finding that the applicant had or had not engaged in misconduct.

was licensed to operate. Specifically, the clear and convincing weight of evidence shows the following:

(a) *Nature of Wrongdoing.* The wrongdoing revealed by the record precludes any reasonable assurance that RKO will be trustworthy in the future and will operate its broadcast station in a manner consistent with the public interest. For many years RKO and General Tire improperly used General Tire's considerable purchasing power as leverage to increase advertising on RKO stations. RKO knowingly filed false financial reports with the Commission. General Tire, RKO's parent, engaged in numerous schemes involving fraud and improper payments to political candidates and foreign government officials; while the sins of the parent should not necessarily be visited upon the subsidiary corporation, General Tire's misconduct here is of particular relevance because of the close relationship between General Tire and RKO. And, perhaps of greatest importance, RKO has demonstrated a persistent lack of candor with the Commission in these proceedings—a lack of candor that coincided with and assisted General Tire's efforts to withhold information about its misconduct from the SEC. It is important to emphasize that, in each of those areas of misconduct, top corporate officials were involved.

(b) *Frequency of Misconduct.* The misconduct engaged in by RKO and General Tire was far from isolated. Quite the contrary. It involved calculated schemes and practices that were maintained over a number of years and terminated only upon the institution of inquiries by public agencies.

(c) *Currency of the Misconduct.* The misconduct revealed by the record goes back, in some instances, more than twenty years; other misconduct, however, occurred in the more recent stages of the instant proceeding and was quite current.

56. In short, each of the basic factors underlying our evaluation here must be resolved against RKO. We recognize that our decision can have a far-reaching impact on RKO and its broadcasting stations. We have not made this decision hastily. To the contrary, we have perused the record with particular care and deliberated at great length before making this decision. We believe that, on the basis of the record of misconduct here, the only reasonable conclusion is that RKO should be disqualified. In making this decision we have adhered to the policies embodied within the Communications Act and existing case law. We have relied on those policies in years past to deny many broadcast licenses.[91] We recognize that the value of RKO's broadcast holdings may be larger than those of other parties who have lost licenses. However, our decision-making standards do not fluctuate with the size of the broadcaster. In every case—whether it involves a large broadcaster in a major city or a small broadcaster in a rural area—we are obligated to protect the public's interest. We have done that here. For in this case, as in every case, the public is entitled to a broadcast license which respects applicable laws and rules, is honest and forthcoming with the Commission and the public, and recognizes its obligation to give precedence to public rather than private interests.

57. The remainder of this section of the opinion is divided into five principal parts: the first part examines the reciprocal trade practices that RKO engaged in with General Tire; the second part reviews the misconduct of

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[91] E.g., *Western Communications, Inc. (KORK-TV)*, 59 FCC 2d 1441 (1975), *affirmed in part and reversed in part on other grounds, sub nom. Las Vegas Valley Broadcasting Co.* v. *FCC*, 589 F.2d 594 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931, *reh. denied*, 442 U.S. 947 (1979); *Eastminster Broadcasting Corp. (WOTW, WOTW-FM)*, 58 FCC 2d 24, *recon. denied*, 60 FCC 2d 850 (1976); *Star Stations of Indiana, Inc.* v. *FCC*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976); *Television Company of America, Inc. (KSHO-TV)*, 1 FCC 2d 91 (1965).

General Tire and explains in greater detail why that misconduct is relevant to an evaluation of RKO's qualifications; the third part reviews the evidence which shows that RKO knowingly filed false financial forms with the Commission; the fourth part examines the particulars in which RKO showed a lack of candor in dealing with this Commission; and the last part explains why RKO's broadcast record cannot overcome the weight of the misconduct and why this case is different from other cases in which meritorious broadcast service has been the basis for overcoming evidence of misconduct.[92]

2. Reciprocal Trade Practices

a. Introduction

58. The Commission is not directly responsible for enforcing antitrust laws or laws relating to unfair trade practices.[93] However, as part of its consideration of the public interest, the Commission must take into account the policies underlying the laws of antitrust and unfair competition.[94] Congress expressed its particular concern that Commission decisions take full account of antitrust laws in Section 313 of the Communications Act of 1934. That section provides in part:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, con-

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[92] Except as otherwise stated in this opinion or in Appendix B (which constitutes our rulings on the parties' exceptions to the ALJ's I.D.), we have accepted the findings and conclusions of the ALJ's Initial Decision in this proceeding.

[93] *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959); *NTA Television Broadcasting Corporation (WNTA-TV)*, 22 RR 273, 293 (1961).

[94] *National Broadcasting Company* v. *United States*, 319 U.S. 190, 223-224 (1943) (hereinafter *NBC*); *Metropolitan Television Company* v. *Federal Communications Commission*, 289 F.2d 874, 876 (D.C. Cir. 1961); *Violation by Applicants of Laws of U.S., supra*, 42 FCC 2d at 401.

> tracts or agreements in restraint of trade are hereby declared to be applicable to . . . interstate or foreign radio communications.[95]

That statutory provision, as well as the legislative history of the Radio Act of 1927 and the Communications Act of 1934, make it clear that Congress conceived that a major function of the Commission would be to preserve competition in broadcasting and to protect the public, as against private, interests. Congress feared that control of broadcasting by a small group would harm the public interest through censorship, poor distribution of service, and discrimination in service.[96]

59. The depth of Congressional concern with anticompetitive practices in broadcasting is highlighted by the part of Section 313 of the Communications Act which provides that if a licensee is found guilty of a violation of the antitrust laws the court may revoke the license. This is the only provision in the Communications Act where a body other than the Commission has the authority to revoke a license granted by the Commission. Further, the Commission is required to refuse a license to anyone whose license has been revoked pursuant to this section.[97] In *NBC* the Supreme Court agreed with the District Court that

> [t]he necessary implication from this [statute] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would con-

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[95] 47 U.S.C. § 313(a).

[96] E.g., 78 Cong. Rec. 8851, 10309-10310, 10323 (1934). See generally H.R. Rep. No. 404. 69th Cong., 1st Sess. 6-24 (1926) (minority views on Radio Act, H.R. 9108, containing summary of attempts to control radio monopolies).

[97] 47 U.S.C. § 313(b).

tinue and that if it did it would make him an unfit licensee.[98]

60. In considering whether the Chain Broadcasting Regulations constituted an ultra vires attempt by the Commission to enforce the antitrust laws, the Supreme Court found that the Commission was properly administering its powers in light of the objectives of the Sherman Act and was not infringing on the province of the Attorney General or the courts. It quoted with approval the following portion of the Commission's *Report on Chain Broadcasting:*

> The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve . . . . While many of the network practices raise serious questions under the antitrust laws, *our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities.* This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.[99]

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[98] 47 F. Supp. 940, 944 (S.D.N.Y. 1942), quoted in 319 U.S. at 222.

[99] *Report on Chain Broadcasting* at 46, 83, 83 n. 3, quoted in 319 U.S. at 223-24 (emphasis added).

61. As indicated in the *Report on Chain Broadcasting*, the Commission concluded that its interest in anticompetitive practices does not depend on a showing that the practices amount to a violation of the antitrust laws. The Supreme Court agreed and held that the Commission must consider the effect of such practices on the public interest regardless of whether there has been a conviction under the antitrust laws:

> That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 [present § 313(b)] the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.[100]

This holding was followed in *Mansfield Journal Co.* v. *Federal Communications Commission.*[101] There the applicant had used its position as the sole newspaper in a community to coerce advertisers to refrain from advertising on a radio station in the community. The applicant had also declined to publish the radio station's program logs and printed only unfavorable comments about the station. The Commission concluded that these anticompetitive practices warranted denial of the newspaper's applications for construction permits. The court affirmed the Commission's decision even though the applicant had not been found guilty of a violation of the antitrust laws and even though the misconduct had not involved the applicant's abuse of a broadcast facility:

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[100] *NBC, supra*, 319 U.S. at 222-23.

[101] 180 F.2d 28 (D.C. Cir. 1950).

> [I]n determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people, it is appropriate that the Commission examine pertinent aspects of the past history of the applicant . . . . [*W*]*hether appellant has been guilty of a violation of these* [*antitrust*] *laws is not here an issue.* The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable to questions arising in the proper discharge of its duties. *Whether Mansfield's activities do or do not amount to a positive violation of law, and neither this court nor the Federal Communications Commission is determining that question, they still may impair Mansfield's ability to serve the public. Thus, whether Mansfield's competitive practices were legal or illegal, in the strict sense, is not conclusive here.* Monopoly in the mass communication of news and advertising is contrary to the public interest, *even if not in terms proscribed by the antitrust laws.*[102]

62. Even where the alleged anticompetitive conduct is carried out in other areas of a licensee's business, the

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[102] *Id.* at 33 (emphasis added).

Commission must examine such behavior in determining whether the applicant possesses the requisite qualifications to be a Commission licensee. This principle was included in our 1951 Policy Statement:

> [O]nly those persons should be licensed who can be relied upon to operate in the public interest, and not engage in monopolistic practices. When passing upon applications of persons who have engaged in monopolistic practices in other industries, the Commission must be concerned as to whether such persons would also engage in monopolistic practices in radio if they were given a license. Their conduct in other fields is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee.[103]

63. Anticompetitive practices by a licensee involving the use of a broadcast facility obviously concern the Commission more than abuses in other areas. Broadcast stations must operate in the public interest; they may not be abused to subserve the purely private interests of licensees.[104] The use of an exclusive broadcasting franchise as a trade weapon, or to gain a competitive advantage, harms the public interest by violating the principles underlying the antitrust laws and policies.[105] As Secretary Hoover testified at the hearings on what became the Radio Act of 1927:

> Radio communication is not to be considered as merely a business carried on for private gain, for

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[103] *Violation by Applicants of Laws of U.S., supra,* 42 FCC 2d at 404. This language was approved by the U.S. Court of Appeals in *Philco* v. *FCC*, 293 F.2d 864, 868 (D.C. Cir. 1961). See also *General Electric Company*, 45 FCC 1592 (1964); *Westinghouse Broadcasting Company*, 44 FCC 2778 (1962).

[104] *Sarkes Tarzian, Inc.*, 23 FCC 2d 221, 222 (1970), and cases cited therein.

[105] *Id.* and cases cited therein.

> private advertisement, or for entertainment of the curious. It is a public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities.[106]

64. The record is clear and convincing that RKO and General Tire engaged in anticompetitive practices within and outside broadcasting. RKO and General Tire systematically engaged in reciprocal trade practices under which suppliers were placed in the position of having to purchase advertising time on RKO stations as a condition of doing business with General Tire. While the law is unclear in some respects, the record demonstrates that some of these activities were probably illegal, and virtually all were anticompetitive. These activities are so inconsistent with the public interest that this basis alone would justify the disqualification of RKO to be the licensee of station WNAC-TV. And certainly this misconduct, considered in conjunction with other misconduct described in this opinion, makes our decision today that much more compelling.

65. The balance of this section sets out the law of reciprocity, the Commission's special concern with reciprocity in broadcasting, the particulars of the misconduct by RKO and General Tire, and the reasons for finding such misconduct improper and inconsistent with the public interest.

b. The Law of Reciprocity

66. Reciprocity is defined as the direction and allocation of a firm's purchase of goods and services so as to promote the sale of its products. The essence of the arrangement is the willingness of one company to buy a particular product from another company on the understanding or expectation that the second company will make

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[106] Quoted in 67 Cong. Rec. 5484 (1926) (quoting testimony of Secretary of Commerce Herbert Hoover).

certain purchases from the first.[107] Reciprocal dealings may be overt, involving explicit agreements resulting from mutual negotiation or coercion. They may also involve more subtle efforts to convince suppliers to redirect purchases to the company which is buying from them, resulting in informal, but implied, agreements.[108]

67. Reciprocal dealings undermine open competition which is essential to our economic system. Under a properly functioning market, a business purchases goods on the basis of quality, service and price. A party with a quality product at a reasonable price has an opportunity to compete for business. Reciprocal trade practices disturb this system by injecting factors other than quality, service and price into the decision to purchase goods or services. The anticompetitive effects of reciprocal trading

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[107] Brief of Department of Justice as Amicus Curiae, In Re RKO General, Inc. (KHJ-TV), June 10, 1970, at 9 (hereinafter DOJ Brief).

[108] DOJ Brief at 11. The Supreme Court, in *Federal Trade Commission v. Consolidated Foods Corporation*, 380 U.S. 592, 594-95 n. 2 (1965) (hereinafter *Consolidated Foods*), cited with approval this exposition of reciprocity:

> A reciprocal buying arrangement may arise either through formal contract or through an informal understanding that may be scarcely distinguishable from a mere policy of cultivating the good will of a large customer. The essence of the arrangement is the willingness of each company to buy from the other, conditioned upon the expectation that the other company will make reciprocal purchases. The goods bought are typically dissimilar in kind, and in the usual case could be obtained from other sources on terms which, aside from the reciprocal trade purchases, would be no less advantageous. *Where such a relationship is well established, it prevents the competitors of each company from selling to the other company, and affords to each company whatever increase of size and strength can be derived from an assured place as supplier to the other.* Edwards, Conglomerate Bigness as a Source of Power, in *National Bureau of Economic Research, Business Concentration and Price Policy*, 331, 342 (1955) (emphasis added).

were forcefully described by the Federal Trade Commission in the *Consolidated Foods* proceeding:

> [Reciprocity] transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market." It distorts the focus of the trader by imposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his product. In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and ultimately the allocation of resources. Obviously, this practice strikes at one of the basic premises of a free enterprise economy.[109]

68. Coercive reciprocity occurs when the market power (not necessarily monopoly power) of one party is used to overbear the will of the other party. In other words, one business approaches another and says, "I will reduce or discontinue my purchase of your product unless you start purchasing (or increase the purchase) of my product," or "I will not even initiate business with you unless you promise to purchase (or increase the purchase) of my products." If the second business deems the continuation or commencement of sales to the first business important to its own success, it succumbs to economic pressure and

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[109] Trade Reg. Rep., 1961-63 FTC Complaints, Orders, Stipulations, para. 16,182 (1962). The Supreme Court has held that reciprocity:

> is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in "an irrelevant and alien factor," F.T.C. P., intruding into the choice among competing products, creating at the least "a priority on the business at equal prices." *Consolidated Foods, supra,* 380 U.S. at 594, quoting *International Salt Co.* v. *U.S.*, 332 U.S. 392, 397 (1947).

agrees to buy reciprocally from the first business. This practice has been illegal since the 1930's. The Federal Trade Commission instituted proceedings at that time in which the coercive use of purchasing power was found to violate Section 5 of the Federal Trade Commission Act as an unfair method of competition.[110]

69. The law is somewhat less clear with respect to what constitutes unlawful non-coercive reciprocity. Obviously, not every situation where two companies mutually buy and sell to each other is anticompetitive or illegal. Two businesses may independently decide to purchase each other's products based on quality, service and price.[111] However, where two companies voluntarily combine to exclude competitors from dealing with the two companies, and where evidence of such combination can be found in an explicit agreement or course of dealings, the resulting bilateral reciprocity arrangement is unlawful.[112] In the absence of an explicit reciprocal agreement, the facts of each case must be examined to determine whether there is a mere concurrence of purchases, independent of each other, or whether the purchases have been mutually induced, and thus are interdependent. In the latter situation the practice is anticompetitive.[113]

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[110] *California Packing Corp.*, 25 FTC 379 (1937); *Mechanical Mfg. Co.*, 16 FTC 67 (1932); *Waugh Equip. Co.*, 15 FTC 232 (1931).

[111] Likewise, with certain limitations, a business' unilateral refusal to deal is permissible under the antitrust laws. *United States* v. *Colgate Co.*, 250 U.S. 300, 307 (1919). Cf. *United States* v. *Parke Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[112] *Columbia Nitrogen Corp.* v. *Royster Co.*, 451 F.2d 3, 14 (4th Cir. 1971); *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36, 59 (S.D.N.Y. 1966); *United States* v. *Empire Gas Corp.*, 393 F. Supp. 903, 914-15 (W.D. Mo. 1975); *W. L. Gore & Associates Inc.* v. *Carlisle Corp.*, 381 F. Supp. 680, 703 (D. Del. 1974).

[113] Handler, *Twenty-fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 60 (1972).

Similarly, it is improper for a party to threaten to use reciprocity as a matter of doing business.[114] As the Supreme Court explained:

> Reciprocal trading may ensue not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate, is an anticompetitive practice.[115]

70. In *Consolidated Foods* the Court found that a merger violated Section 7 of the Clayton Act because the potential for reciprocal trading would lessen competition. Other courts have used the reasoning of *Consolidated Foods* to find the practice of reciprocity itself unlawful. As Chief Judge Bazelon recognized:

> If the possibility of reciprocal dealing is sufficient to set aside a merger, it must certainly follow that actual engagement in reciprocal dealing would violate some provisions of the antitrust laws.[116]

Reasoning similar to Judge Bazelon's was evident in *W. L. Gore & Associates, Inc.* v. *Carlisle Corp., supra*, a patent infringement suit.[117] The defendant counterclaimed that the plaintiff tried to use its purchasing power to induce the defendant to accept a settlement of a patent challenge. Relying on *Consolidated Foods*, the court held that such anticompetitive practices were unlawful:

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[114] *W. L. Gore & Associates, Inc.* v. *Carlisle Corp., supra*, 381 F. Supp. at 703.

[115] *Consolidated Foods, supra*, 380 U.S. at 594.

[116] *Fidelity Television, Inc.* v. *FCC*, 515 F.2d at 719-20, n. 59 (Bazelon C.J., dissenting to denial of pet. for reh.).

[117] "[T]his court has no difficulty in concluding that if corporate mergers can be included under Clayton Act § 7 because of the *potential* they create for reciprocal dealing, the actual practice of reciprocity can also violate the antitrust laws." *W. L. Gore & Associates, Inc.* v. *Carlisle Corp., supra*, 381 F. Supp. at 703.

> What is prohibited is the use of buying power in one market to cause an injury to competition in another market.[118]

The *Gore* case is particularly significant because the court's holding of unlawful behavior did not rest on any agreement between the parties; the court said it was unlawful under the Sherman Act because the plaintiff had *tried* to use reciprocity as a means to monopolize a market.[119]

71. Another important case, *United States* v. *General Dynamics Corp.*,[120] also dealt with reciprocity in a merger context. In that case the acquired company was particularly interested in increasing its sales, taking advantage of the opportunities for reciprocity available to it as a result of the considerable purchasing power of the conglomerate.[121] Citing *Consolidated Foods*, the court found that the merger violated Section 7 of the Clayton Act because it was reasonably likely to result in a substantial lessening of competition.[122] Furthermore, the court held that agreements entered into pursuant to such reciprocal dealings would be anticompetitive and unlawful under Section 1 of the Sherman Act if a not insubstantial amount of commerce were involved.[123] In other antitrust cases the Supreme Court has found that as little as $60,800 was "not insubstantial" for purposes of illegality.[124]

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[118] *Id.*

[119] 381 F. Supp. at 703, 705.

[120] 258 F. Supp. 36 (S.D.N.Y. 1966).

[121] *Id.* at 42.

[122] *Id.* at 65.

[123] *Id.* at 66-67.

[124] *U.S.* v. *Loew's Inc.*, 371 U.S. 38, 49 (1962). See also *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501-502 (1969) ($190,000 not insubstantial). See generally Section of Antitrust Law of the American Bar Association, Antitrust Law Developments 40-41 (1975).

72. In the early 1970's the Department of Justice filed a number of suits against corporations which engaged in "trade relations," including a case against General Tire and RKO General.[125] Most of these cases were settled by consent decrees,[126] so there is little case law dealing directly with the legality of "trade relations."

73. Nonetheless, while this area of law is far from settled, the fundamental principles may be summarized as follows. First, the courts, the Department of Justice, and the FTC have uniformly declared that coercive reciprocity is anticompetitive and in violation of the antitrust laws.[127] Second, where the facts will support a finding that a company induced sales of its products through the threatened withdrawal or reduction of purchase orders or where the placing of such orders is conditioned on reciprocal buying by the supplier, the courts have condemned the conduct as anticompetitive.[128] Third, although a company's unilateral determination to buy from firms which are also good customers may be a first step

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[125] *United States* v. *The General Tire & Rubber Company, Aerojet-General Corporation, A. M. Byers Company and RKO General Incorporated,* Civil Action No. C-67-155 (N.D. Ohio, Eastern Division).

[126] See, *e.g., United States* v. *T.I.M.E.-D.C., Inc.* 1972 Trade Cas. para. 74,069 (N.D. Tex. 1972); *United States* v. *Westinghouse Elec. Corp.,* 1972 Trade Cas. para. 74,053 (W.D. Pa. 1972), *modified,* 1973 Trade Cas. para. 74,574 (W.D. Pa. 1973); *United States* v. *Jackson's Atlanta Ready Mix Concrete Co.,* 1972 Trade Cas. para. 73,827 (N.D. Ga. 1972); *United States* v. *Owens-Illinois, Inc.,* 1972 Trade Cas. para. 73,828 (N.D. Ohio 1972); *United States* v. *W. R. Grace & Co.,* 1972 Trade Cas. para. 73,829 (S.D.N.Y. 1972); *United States* v. *General Tire & Rubber Co.,* 1970 Trade Cas. para. 73,303 (N.D. Ohio 1970); *United States* v. *Republic Steel Corp.,* 1970 Trade Cas. para. 73,246 (N.D. Ohio 1970); *United States* v. *Inland Steel Co.,* 1970 Trade Cas. para. 73,197 (N.D. Ill. 1970); *United States* v. *United States Steel Corp.,* 1969 Trade Cas. para. 72,826 (W.D. Pa. 1969).

[127] See *United States* v. *General Dynamics Corp., supra,* 258 F. Supp. at 58-59, and authorities cited therein.

[128] *Id.*

toward development of the two forms of reciprocal dealing described above, unless such a further development occurs, it appears the courts and commentators have not considered the activity to be anticompetitive. But if a bilateral mutual reciprocity agreement does emerge, or is attempted, the conduct is also unlawful.[129]

74. We have summarized the law of reciprocity because it amplifies the purposes to be served by antitrust laws. But, as we explained previously, our analysis is not dependent on finding that a violation in the strict legal sense did in fact occur. This is especially so when, as here, we find that the anticompetitive conduct involves the use of a broadcast facility.

c. *Commission Concern with Reciprocal Dealings in Broadcasting*

75. Reciprocal trading in broadcasting particularly undermines the public interest. When the market functions properly, the quality and responsiveness of programming generate advertising revenue, which can then be used to further improve programming, thus serving the public interest. Reciprocal trading disturbs this cycle by injecting factors that the advertiser would otherwise not consider. In other words, instead of purchasing time on the station that offers the lowest rates, the largest audience, or the audience with the most desired demographic characteristics, the advertiser will purchase time on the station owned by a user of his product or service and forego purchase of time on other stations.

76. In its brief filed in the KHJ-TV proceeding, the Department of Justice cogently described the impact that reciprocal dealings in broadcasting have on the public interest:

> As a general rule, a commercial television station's financial success depends upon its capacity to broad-

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[129] See cases cited in note 112 *supra*.

> cast attractive programming and to sell its broadcast time to advertisers. These two factors are interdependent, in that programming attracts the larger audiences and better ratings sought by potential advertisers and advertisers provide the station with revenue necessary for attractive programs and resultant impressive ratings.
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> [T]he practice of reciprocity, as a selling aid in the commercial broadcasting industry, may seriously impair the desired competitive process which allocates business on the basis of price, quality, and service in the industry. *To the extent that a broadcast licensee can rely on reciprocal purchasing power to obtain advertising, it may cease to try to provide the quality of product and service which he would have had, had he been faced with competition.*[130]

77. Even if the practices do not rise to the level of illegal conduct, the abuse of a public facility is improper and contrary to the public interest. In *Mansfield Journal Co.* v. *Federal Communications Commission*, *supra*, the court upheld the denial of a license to an applicant which had used its position as the sole newspaper in the community to coerce its advertisers to refrain from advertising on the radio station in the community. It is worth repeating the controlling language of the court's opinion:

> [W]hether appellant has been guilty of a violation of these laws is not here in issue . . . . *Whether Mansfield's activities do or do not amount to a positive violation of law, . . . they still may impair Mansfield's ability to serve the public.* Thus, whether Mansfield's competitive practices were legal or illegal, in the strict sense, is not conclusive here. Monopoly in the mass communication of news and advertising

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[130] DOJ Brief at 20-21 (emphasis added).

> is contrary to the public interest, even if not in terms proscribed by the antitrust laws.[131]

The distortion of the broadcast market by the use of reciprocal trade practices likewise impairs the licensee's ability to serve the public interest, "even if not in terms proscribed by the antitrust laws."

78. Moreover, even attempts at reciprocity are of concern to the Commission. Whether an actual agreement results may be a fortuity. The attempt to use market power to gain broadcast advertising calls into serious question the licensee's dedication to the public interest. As the Court of Appeals for the District of Columbia has said:

> [I]t is settled that practices which present realistic dangers of competitive restraint are a proper consideration for the Commission in determining the public interest, convenience and necessity. And the elimination of this danger is consistent with the Commission's duty under the Act to "encourage the larger and more effective use of radio in the public interest." [132]

In this context, we must scrutinize the General Tire/RKO reciprocal trade practices and assess their impact on RKO's qualifications to be a broadcast licensee.

d. General Tire/RKO Reciprocal Dealings

79. The record contains many examples of General Tire inducing companies to advertise on RKO stations

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[131] 180 F.2d at 33 (emphasis added). See *NBC, supra,* 319 U.S. at 223-224.

[132] *Metropolitan Television Co.* v. *FCC, supra,* 289 F.2d at 876 (citations omitted). We have also found that agreements providing for reciprocal dealings in the Common Carrier context are "unfair, anticompetitive and contrary to the public interest" regardless of whether non-coercive reciprocity is *per se* unlawful. *Domestic Public Message Services,* 73 FCC 2d 151, 159, 162-63 (1979).

as a condition of doing business with General Tire. In some instances these efforts were successful, with the result that businesses advertised on RKO stations even though those stations were apparently not best suited to their needs and desires. In other cases the advertisers resisted RKO's efforts to engage in reciprocal dealings. But in either type of situation it is clear that General Tire and RKO were prepared to involve broadcast facilities in anticompetitive practices and to distort the market for broadcast advertising (and the supply of revenue for programming), thereby undermining the public interest. Before looking into these matters, however, it is necessary to set out the context in which they occurred.

80. In 1961, General Tire formally organized a "trade relations" division, with John G. Ragsdale as its director. Prior to his formal appointment as director of trade relations, Ragsdale began gathering data with regard to purchases and sales and establishing procedures for the gathering and recording of such data. Prior to that time, information regarding General Tire's vendors had not been regularly gathered. Following his appointment, Ragsdale prepared forms and set up files on those companies which conducted business with General Tire and its subsidiaries. These files contained data on the amount of business consummated annually between the subject company and General Tire.[133] Certain of these lists were distributed to selected department heads throughout the General Tire organization. Ragsdale's function was to advise General Tire's purchasing departments, particularly those at plants outside Akron, as to who General Tire's customers were prior to those departments making long term commitments to purchase supplies. The objective was to facilitate and implement "reciprocal trade practices"—a practice whereby General Tire business would be directed to those who purchased General Tire

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[133] I.D. paras. 271-273; *RKO General, Inc. (KHJ-TV I.D.)*, 44 FCC 2d 149, 201-202. *Cf. United States* v. *General Dynamics Corp., supra*, 258 F. Supp. at 43-44.

products. Working with the traffic and purchasing departments of General Tire and the trade relations personnel of its subsidiaries, including Aerojet and RKO, Ragsdale contacted General Tire's existing and potential suppliers in an effort to increase sales for General Tire.[134]

81. Between 1960 and 1967, General Tire, as a company policy, favored with its freight business those trucking companies which utilized its products. Many trucking companies, in turn, based their decisions about tire purchases on the amount of freight business they received from General Tire. The Administrative Law Judge found that such practices were not unique to General Tire's business dealings but were customary in both the tire and trucking industry—the tire manufacturers sometimes used their freight allocations, with service and rates still primary factors, to stimulate tire sales, while the truckers balanced their tire purchases on the basis of the revenues derived from the tire manufacturers.[135] The Judge's specific findings concerning the motor carriers reveal that General Tire took measures to withhold, reduce, or eliminate entirely its freight business with nine trucking companies which did not make sufficient purchases of General Tire products.[136] Generally, the Judge found that reciprocal trade practices played a role in General Tire's conduct of business with 125 companies.[137]

82. RKO did not have a formal trade relations department. In 1960, however, RKO hired Robert Wilke,

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[134] I.D. para. 274. See Community (hereinafter Comm.) Ex. I, Doc. 06644 (unless otherwise noted, all Community exhibits are from the WNAC-TV proceeding); Tr. 7566-67, 7615. Thus, sales efforts were made by General Tire personnel who were not affiliated with what would ordinarily be considered a company's sales staff. *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d at 129; *RKO General, Inc. (KHJ-TV I.D.)*, 44 FCC 2d at 201.

[135] I.D. para. 269.

[136] I.D. at paras. 280-85.

[137] I.D. paras. 280-362.

who had no background in broadcasting, as a "goodwill ambassador or missionary salesman"; he operated in the area of trade relations for RKO, adopting the title "director of corporate relations" and reporting to the president of RKO. Wilke's function was to establish initial contacts with advertising agencies and potential advertisers to sell RKO and General Tire institutionally; thereafter, regular RKO sales personnel conducted any resulting sales negotiations. Upon the formation of General Tire's trade relations division in 1961, Wilke became Ragsdale's liaison man at RKO. Ragsdale sent lists to Wilke of General Tire's suppliers and Wilke sent lists of RKO expenditures to Ragsdale. The two men were in contact with each other by mail or telephone approximately every two weeks.[138]

83. These efforts led to instances where companies were induced to advertise on RKO stations as a condition of continuing to do business with General Tire even though RKO stations might not be best suited to the needs and desires of the advertisers. There is an abundance of evidence that RKO used various tactics—from gentle persuasion to threats of economic boycott—to make it evident to advertisers that General Tire's business would be given to them only if they advertised on RKO stations. In at least some instances RKO's efforts were successful since advertisers were anxious to secure the considerable business of General Tire. Some specific examples illustrate the nature and impact of RKO's involvement in these reciprocal practices:

> (1) *Equitable Life Assurance Society.* The record demonstrates that RKO and General Tire used their position as major customers of Equitable Life Assurance Society to pressure Equitable to advertise on RKO stations. These efforts were successful. When necessary, RKO's sales techniques were coercive in

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[138] I.D. para. 275. See Tr. 6527, 6614-15, 7209, 7617.

nature. At one point, Harry Trenner [RKO] wrote to his superior: "We surely must be paying Equitable a lot of money. Enough in fact, so that they are able to buy time on competitive radio stations in Los Angeles and leave KHJ and KFRC off the list." [139] John Ragsdale [General Tire], upon seeing the Trenner letter, wrote Robert Wilke [RKO], "I understand Equitable is buying radio time on competitive stations in Los Angeles and San Francisco. In view of the amount of business we give them, I should think we could get on their list." [140] A short while later, an RKO station sales manager wrote, "[S]uggest management of RKO General or General Tire put *pressure* on Equitable home office to assure our purchase." [141] Pressure was applied, as evidenced by correspondence between Equitable executives. A discussion between an RKO representative and an Equitable advertising manager was described in the correspondence: "some elements of the atmosphere had become quite disagreeable, since the RKO representative had indirectly threatened to take away their business if the Equitable did not accede to their request, which apparently involved including all seven stations in the program." [142] Eventually, Equitable acceded and advertised on four RKO stations. In so doing, Equitable had to take money away from those stations on which it had already decided to advertise. An account executive with Equitable's advertising agency wrote to an Equitable president, "For your information, we are purchasing a schedule in Boston on

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[139] I.D. para. 330; Fidelity (hereinafter Fid.) Ex. 119 (unless otherwise noted, all Fidelity exhibits are from the KHJ-TV proceeding).

[140] I.D. para. 330: Fid. Ex. 120.

[141] I.D. para. 330; Fid. Ex. 218 (emphasis added).

[142] I.D. para. 330; Fid. Ex. 108 (emphasis added).

WNAC, and in Detroit [Windsor, Ontario] on station CKLW. We obviously had to cut back on our original schedule to accommodate these additions." [143] Thus, the pressure from General Tire/RKO went beyond mere mutuality of business interests and demonstrated elements of coercion.

(2) *Fugazy Travel Bureau, Inc.* General Tire's arrangement with Fugazy Travel included an agreement that Fugazy spend a specific percentage of its billings to General Tire on advertising on RKO stations. Fugazy Travel, now a subsidiary of Diner's Club, Inc., is a national travel agency. Fugazy obtained General Tire's travel business, including RKO and Aerojet's business, in return for a promise to advertise on RKO stations in an amount equal to 1½ percent of its gross billings to General Tire.[144]

(3) *Lyon Van Lines, Inc.* There is clear evidence that reciprocity played a direct role in Lyon Van Lines' advertising on RKO station KHJ.

By letter to a General Tire official, dated March 24, 1964, the general sales manager of Lyon stated that Lyon's purchases from General Tire in 1964 should show an increase of 50% over its purchases in 1963. These purchases were to include advertising over station KHJ:

> Our contract with RKO General Radio Station KHJ is for $11,370.00 in 1964, there was no contract in 1963 . . . *Solely because of your trade relations program we chose KHJ over other radio stations.*[145]

In another letter, dated September 3, 1964, the vice president and general purchasing agent of Lyon stated to a General Tire official:

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[143] I.D. para. 330; Comm. Ex. 178, F. C. & B. [Foote, Cone & Belding] at 1.

[144] I.D. para. 331; Fid. Ex. 105.

[145] I.D. para. 287; Fid. Ex. 206 (emphasis added).

> Thank you for introducing the concept of Corporate Trade Relations into the business practices of the Lyon organization . . . . *Acting upon your suggestions we made certain that the products and services of your Company including station KHJ were purchased whenever possible.*[146]

Not all of General Tire's and RKO's efforts met with success. In at least one instance, such resistance led to suggestions for a boycott by General Tire.

(4) *American Airlines.* General Tire and Aerojet were substantial customers of American Airlines in the period 1960 through 1970. American was approached by representatives of General Tire and RKO about increasing its purchases of RKO's broadcast time. After one unsuccessful attempt to sell time, Harry Trenner of RKO wrote the following to Jerry Bess, assistant to the President of RKO:

> The last time I was in New York, Bob Wilke got me in to see the big boy at American Airlines. We made a pitch and nothing happened. The fact that we spend something well over a million dollars with this company means nothing, because some girl at the agency says our cost per thousand is not as good as some stations they are buying . . . . There are, apparently, a hell of a lot of dollars for the stations from American without any "trade relations". *If we had great ratings and cost per thousand, we wouldn't need "trade relations" any more than KFAC does . . . .* I would just like to know how I am supposed to use trade relations. I presume it was set up for one purpose. But if I am wrong, tell me, and I'll back away . . . .[147]

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[146] I.D. para. 287; Comm. Ex. 164 Doc. 61404 (emphasis added).

[147] I.D. para. 321; Fid. Ex. 164 (emphasis added).

> In other words, RKO complained because American Airlines' decision to purchase advertising time was based on cost to American. RKO felt that "reciprocal favors" should outweigh those economic factors. Apparently, American Airlines was not responsive to RKO's suggestions. Therefore, it was recommended that General Tire reduce its use of the airlines. John Ragsdale of General Tire was advised by one of his assistants in the Trade Relations Department to cut back on General Tire purchases from American: "In addition to the million a year we spend on tickets with American Airlines, I note that Aerojet has paid them $102,000 the past nine months for Air Freight shipments . . . I have talked to Vic Caffee about this Air Freight, and unless there is some reason, such as schedules and routings that require use of American, we need not favor them."[148]

One last example indicates the pervasiveness of the "trade relations" program, demonstrating that it extended to numerous levels of the companies involved.

> (5) *PepsiCo.* PepsiCo was a supplier to General Tire and to Video Independent Theatres, an RKO subsidiary. PepsiCo was interested in utilizing its purchases of General Tire products in order to increase the sale of its products to General Tire and its subsidiaries. In a memorandum from Robert Wilke to T. F. O'Neil, Wilke stated that "[t]he advertising manager of Pepsi Cola has informed his agency of a desire to include the RKO General Stations in all future Pepsi spot campaigns . . . We in turn are attempting to obtain greater exposure for Pepsi Cola in those General Tire Co. plants where Pepsi sales are nil or lagging."[149] Charles Baker, vice president-sales

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[148] I.D. para. 321; Fid. Ex. 178.

[149] I.D. para. 320; Fid. Ex. 144.

of PepsiCo wrote a memorandum to another PepsiCo official:

> Some time ago Bill Durkee established a very fine rapport, with General Tire and Rubber Company through then President and major stockholder. Tom O'Neill [sic] . . . Bill asked me to work with O'Neill's [sic] assistant, Robert Wilkie [sic], to get all the extra business from these diversified activities that could be developed. In return we were to encourage our bottlers to use various radio and TV stations owned by General Tire as much as possible.[150]

At one point, Baker explained the General Tire-PepsiCo relationship to a PepsiCo local bottler in the following language:

> The relationship established by Bill Durkee with General Tire is somewhat complicated but goes this way: Walter Duncan [a PepsiCola bottler] . . . is an old and intimate friend of the O'Neil family who practically own General Tire & Rubber Co. In pursuing this relationship it was discovered that among the properties of General Tire . . . was a chain of television and radio stations . . . The net result was that a Robert Wilkie [sic] was assigned by the O'Neils to work with me in getting Pepsi-Cola representation in all installations controlled by General Tire where feasible.[151]

At times, Baker had to pressure his own people to forsake their independent judgment and advertise with RKO. In a letter to Robert Wilke of RKO, Baker stated, "I put some pressure on our bottler in San Francisco to get him to put some pressure on his advertising agency in your behalf, and I would like to find out what this resulted in, if anything." [152]

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[150] I.D. para. 320; Fid. Ex. 175.

[151] I.D. para. 320; Fid. Ex. 174.

84. In sum, as these examples show, General Tire and RKO were willing and sometimes able to introduce an extrinsic factor—the considerable purchasing power of General Tire—into several broadcast markets.

e. Propriety of General Tire/RKO Reciprocal Dealings

85. In assessing the record in this case the Administrative Law Judge concluded that there was no basis for charging General Tire or RKO with knowing and willful misconduct, and, hence, no basis to disqualify RKO or to assess a comparative demerit against it.[153] His conclusion was based on his view that, at the time of the occurrences, there was no certainty that General Tire's and RKO's practices were illegal.[154] According to the Judge, the reciprocity program was a basically honest effort to improve business relationships: ". . . service, price, and quality being equal—they preferred doing business with their friends." [155]

86. We disagree with this conclusion.[156] The law has been clear since the 1930's that coercive reciprocal dealings

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[152] I.D. para. 320; Fid. Ex. 150.

[153] I.D. para. 380.

[154] I.D. para. 379.

[155] I.D. para. 380.

[156] We recognize that in our earlier analysis of RKO's anticompetitive conduct we took a different view than we do today. *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123 (1973). Several factors explain this difference. To begin with, the record in the KHJ-TV case was developed only with respect to practices directly related to the operation of Station KHJ-TV. Indeed, the Hearing Examiner strictly limited the introduction of evidence to that developed in the course of the Justice Department's antitrust suit against RKO and General Tire and only if that information was "patently germane to RKO's stewardship of KHJ-TV." FCC 68M-394 (March

are unlawful.[157] To the extent that General Tire used its market power to overbear the will of the other parties, it was without doubt acting illegally. RKO maintains that no coercion was applied to suppliers to force them to do anything against their will,[158] and that "there is no evidence that RKO obtained advertising through reciprocal arrangements or increased or maintained sales of advertising by using the purchasing power of General Tire in any coercive manner." [159] This contention is flatly contradicted by the record. Coercion occurred, for example, in the case of Equitable Life Assurance Society, where Equitable felt compelled to advertise on RKO stations in order to continue its insurance business with General Tire.

87. We do recognize, however, that judicial interpretations of antitrust laws are subject to change and often

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11, 1968), quoted at 44 FCC 2d at 152. Thus, our consideration was strictly limited to the renewal of the license of station KHJ-TV. 44 FCC 2d at 129. The scope of the present proceeding is broader, and the record is more fully developed now. For example, the Hearing Examiner in the prior proceeding made findings on the reciprocity issue with respect to 22 companies which dealt with General Tire and RKO. 44 FCC 2d at 202-17. The Administrative Law Judge in the present proceeding had sufficient evidence to deal with 171 companies which conducted business with RKO and/or General Tire. I.D. (WNAC-TV) paras. 280-363. RKO's reciprocal dealings with several companies such as Union Carbide, Dow Chemical, Kaiser Industries, American Cyanamid, Texaco, Atlantic-Richfield, and St. Regis were not considered at all in the KHJ-TV proceeding, only in the present proceeding. We have now looked at that fuller record from the broader perspective of RKO's general stewardship. Due to the more complete record and our closer examination of the law, we have a greater appreciation now for the adverse impact of reciprocal trade practices on the broadcast industry and thus on the public interest.

[157] See cases cited at note 110, *supra*.

[158] Reply Brief of RKO General, Inc. in Opposition to Exceptions to Initial Decision, October 18, 1974, at 89-92 (hereinafter Reply Brief).

[159] *Id.* at 100.

dependent on the facts of the particular case involved.[160] RKO relies on that point and asserts that "there is not one court decision which declares that reciprocity itself is a violation of the antitrust laws or an anticompetitive practice in violation thereof."[161] That statement, however, ignores the Supreme Court finding in *Consolidated Foods* that reciprocity is, indeed, an anticompetitive practice.[162] The District Court in *General Dynamics* similarly said that reciprocal dealings could violate the Sherman Act if a "not insubstantial" amount of commerce were involved.[163] Contrary to RKO's suggestion,[164] the value of the advertising time involved in the reciprocity program easily exceeds the $60,000 "substantiality" threshold set by the Supreme Court.[165] Furthermore, even assuming, *arguendo*, that the amount involved was below that threshold, it would be irrelevant to our analysis. Our statutory obligation to ensure service in the public interest justifies our concern with a reciprocal trade program involving broadcast facilities regardless of whether the amounts involved are sufficiently substantial to give a court jurisdiction over an antitrust controversy.[166]

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[160] However, this has not discouraged courts from finding behavior unlawful even though the parties had no prior explicit guidance on the points at issue. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-40 (1978).

[161] Reply Brief at 98.

[162] 380 U.S. at 594.

[163] 258 F. Supp. at 66-67.

[164] Reply Brief at 93.

[165] *U.S.* v. *Loew's Inc.*, *supra*, 371 U.S. at 49. Admittedly, there are no precise figures in the record specifying the amounts of advertising RKO obtained solely through reciprocal trade practices. However, the record demonstrates that RKO was dealing with large advertisers whose involvement in the reciprocity program was so intertwined in their advertising purchases, and whose total purchases were so substantial, that we are justified in concluding that competition was affected in substantial amounts. For example, one advertiser, Lyon Van Lines, Inc. spent $11,370 to advertise on KHJ in 1964 alone, and admitted that the purchase was made "solely because of [RKO's] trade relations program . . . ." I.D. para. 287; Fid. Ex. 206. In the period 1961 through 1966 PepsiCo spent $767,731 on RKO facilities. Comm. Ex. 179 at 8-9. Expenditures by Equitable Life Assurance Society on RKO stations in the years 1962 through 1966 amounted to $162,921. Comm. Ex. 179 at 4-5. These few examples make it clear that the value of advertising time which RKO did actually sell and/or attempted to sell through the reciprocity program well exceeded the $60,000 threshold.

88. RKO, however, contends that its activities were not illegal because they were based on mutuality: "So long as this other party is free to buy General Tire or not to buy, we are not even faced with a question deserving analysis." [167] This contention is not supported by the law or by the facts. Voluntary bilateral reciprocity is illegal where companies combine to exclude competitors and where evidence of such combination can be found in an explicit agreement or course of dealing.[168] Even the threat to use reciprocal practices in an effort to monopolize is unlawful.[169] The record contains evidence that General Tire and RKO did indeed engage in these kinds of judicially-condemned practices. Equitable Life Assurance Society was "free to buy or not to buy" only if it wished to lose General Tire's business; Fugazy Travel was required to spend a specific percentage of its billings to General Tire on advertising on RKO stations; and

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[166] See Chief Judge Bazelon's dissent to the denial of rehearing in *Fidelity* v. *FCC*, *supra*, "[The assertion] that an insufficient amount of commerce was affected to bring to bear the sanction of the antitrust laws is clearly erroneous . . . [T]he commerce requirement is a jurisdictional requirement for federal courts tied to policies of federalism and says nothing about the validity of the trade practices involved. Thus, since the FCC has established jurisdiction over individual licensees, the jurisdictional requirement is not relevant and hence the Commission must look only to the substantive validity of the trade practices involved." 515 F.2d at 720.

[167] Reply Brief at 88.

[168] See cases cited at note 112, *supra*.

[169] *W. L. Gore & Associates, Inc.* v. *Carlisle Corp.*, *supra*.

PepsiCo clearly had an "understanding" with General Tire to engage in reciprocal dealings.

89. Moreover, regardless of whether General Tire's and RKO's conduct was unlawful at the time it occurred, it was highly improper. The injection of extrinsic factors into the decision to advertise undermines the public interest to be served by broadcast licensees. The competitive process in broadcasting allocates business on the basis of quality of programming and responsiveness to the public. Reciprocity in broadcasting, such as that practiced by General Tire and RKO, skews the broadcast market and rewards licensees regardless of the quality and responsiveness of programming. In the end, the public suffers. To quote Chief Judge Bazelon:

> [U]se of reciprocal dealing to obtain advertising reduces the incentive to meet the needs of the public since advertising is garnered by economic power and not successful competition.[170]

90. RKO nonetheless asserts that its suppliers were not dependent on General Tire's business and that those suppliers were in fact large companies able to withstand any alleged pressure. RKO supports these assertions by referring to General Tire's activities in the trucking industry and the size of its suppliers in that industry. RKO further asserts that reciprocal dealing was widespread in the trucking industry and not instigated by General Tire: "General Tire either had to accede to this system or forego selling its tires."[171]

91. Whatever the practices may have been in the trucking industry, there is no evidence whatsoever that reciprocity was a way of life in the broadcast industry. RKO did not have to accede to any "system" in order to sell its advertising time. Nor can RKO escape the impli-

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[170] 515 F.2d at 720.

[171] Reply Brief at 91-92, 94.

cations of its misconduct by reference to the size of the companies with whom it dealt. The ability of large firms to withstand pressure to engage in reciprocal trading does not make the practice acceptable. Even if they can withstand the loss of some business, large companies may still allow extrinsic factors to alter their independent judgment. This in turn means that the broadcast market may be disturbed and the public harmed.[172] And, contrary to RKO's claim,[173] the fact that illegal or improper activities have ceased does not render them irrelevant to our decision. This is especially so here where the activities were terminated only after the Department of Justice filed an antitrust lawsuit. While the consent decree prohibits RKO and General Tire from engaging in reciprocal dealings until 1980, we are still troubled by their willingness to shortchange the public interest for private gain.

92. All of this leads to one inescapable conclusion; regardless of the legality of RKO's and General Tire's conduct, their practices were unequivocally improper. As a public trustee, pledged to serve the public interest, RKO must be held to a very high standard of behavior.[174] Because of its reciprocal dealings alone—and certainly when considered with other misconduct—RKO cannot satisfy that high standard.

3. Non-Broadcast Misconduct of General Tire

93. The reciprocal trade program revealed that, at least in some matters, General Tire works closely with RKO. It is that practical corporate relationship, as well

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[172] "The harm produced by the practice [of mutual reciprocity] accrues to the competitors of the participants and *ultimately to the public.*" *U.S.* v. *General Dynamics Corp.*, *supra*, 258 F. Supp. at 45 (emphasis added).

[173] See Reply Brief at 99.

[174] E.g., *Office of Communications of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

as the legal control which General Tire maintains over RKO, that requires us to inquire into possible misconduct of General Tire and its impact on RKO's qualifications to be a broadcast licensee. As explained below, that inquiry leads us to the conclusion that General Tire has engaged in a serious pattern of misconduct in a number of areas and that this misconduct does have an adverse effect on RKO's qualifications. In order to appreciate the basis for our conclusion here, this part addresses three principal points: first, the general policy and legal basis for our review of non-broadcast misconduct; second, the nature of General Tire's relationship with RKO; and third, the nature and scope of General Tire's misconduct.

a. Relevance of Non-broadcast Misconduct

94. The Commission is empowered by Section 308 of the Act to consider character qualifications of broadcast applicants.[175] The Commission has traditionally exercised this authority because of our belief that such qualifications comprise an essential ingredient in assuring that the grant of a broadcast license will serve the public interest.[176] In part, our concern with "character" qualifications

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[175] 47 U.S.C. § 308(b).

[176] E.g., *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106, 1108 (1975). See generally, *Violation by Applicants of Laws of U.S.*, *supra*, 42 FCC 2d at 400. In order to implement Section 30u, the Commission has promulgated rules intended to elicit "character" type information from applicants. Section 73.24(d) of the Commission's Rules [47 C.F.R. 73.24(d)] reads, in pertinent part, as follows:

> An authorization for a new broadcast station . . . will be issued only after a satisfatory showing has been made . . . that the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfatory public service.

Although the rule's language deals specifically with authorizations for new broadcast stations, the provision, in implementing Section is a reflection of the fact that the radio spectrum is a scarce public resource. Therefore, one of our most basic concerns is that a given applicant be qualified to act as a "public trustee." [177] Such a determination is prospective in nature. In making that determination, however, we must look to the applicant's past conduct, including actions occurring outside of broadcasting as well as within. This is because even non-broadcast conduct can reflect on a party's willingness and ability to abide by applicable laws and rules, to be honest and forthright, and to operate a broadcast station in the public interest. As we explained in *Westinghouse Broadcasting Company* almost twenty years ago:

> Licensing is prospective—it entails future conduct. In discharging its licensing function, the Commission puts the public interest out at risk, since the issuance of an authorization entails at best only an estimate of the likelihood that performance under the license will be worthy. In aid of the forecasting process, the application for authorization searches out an applicant's background for clues as to risks and for evidence as to expectable performance. Any conduct of an applicant may be said to be probative and meaningful which illuminates the likelihood of prospective conduct and the character of probable performance in the broadcast field. It is reasonable, therefore, for the Commission to look to conduct in other fields in

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308(d) of the Act, effectively applies also to licensees applying for renewal of licenses since they must also have satisfactory character qualifications. See 47 U.S.C. § 309(a). See also e.g., *Grenco, Inc.*, 39 FCC 2d 732 (1973).

[177] "[B]roadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept." *Office of Communication of the United Church of Christ* v. *FCC*, *supra*, 425 F.2d at 548.

order to search out relevant attitudes and propensities.[178]

95. The courts have approved, if not mandated, Commission inquiry into non-broadcast misconduct—even if it does not amount to a crime. In *Mester* v. *United States, supra,* the court affirmed a Commission decision denying an application for consent to transfer control of a license for a radio station. The Commission had concluded that the proposed transferees were not qualified and that the transfer would not be in the public interest. This conclusion was based upon, *inter alia,* a finding that the transferees had used misleading and other deceptive trade practices in conducting their non-broadcast business. These deceptive practices involved repeated violations of Food and Drug Administration regulations and the Emergency Price Control Act of 1942. On appeal, the court upheld the Commission's conclusion that the transferees had shown a flagrant disregard for government regulation, thereby making a grant of their application inadvisable from a public interest viewpoint. In sustaining the Commission, moreover, the court made it clear that an examination of character should not be confined to broadcast-related misconduct or even to criminal convictions:

> A person's "character" is usually thought to embrace all his qualities and deficiencies regarding traits of personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc. which distinguish him as a human being from his fellow men. His disposition toward criminal acts is only one of the qualities which constitute his character . . . . [C]ourts must give to words their commonly understood definitions and in this case "character" cer-

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[178] 44 FCC at 2783. Accord, *Arde Bulova,* 11 FCC 137, 149 (1946), *aff'd sub nom. Mester* v. *United States,* 70 F. Supp. 118 (E.D.N.Y.), *aff'd per curiam,* 332 U.S. 749 (1947).

> tainly embraces involvement in the [non-broadcast-related] litigation proved against the plaintiffs and their disposition not to be ingenuous and truthful concerning it.
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> . . . Inquiry into an applicant's character, as commonly understood, would certainly be material [to Commission action under Section 310 of the Act]. An inquiry which concerned itself only with convictions for felony or of crimes involving moral turpitude would be grossly inadequate. It might indeed be most inadvisable from the public viewpoint to entrust the operation of a radio station to a person unworthy of belief and evidencing a disregard for regulatory laws, even though he had never been convicted of a felony.[179]

96. RKO recognizes that non-broadcast activities might, in appropriate cases, be relevant to an applicant's character qualifications.[180] However, it argues that the Commission has never disqualified a renewal applicant solely for non-broadcast misconduct.[181] RKO maintains that it would be arbitrary to depart from this "long-established precedent" by disqualifying RKO. Such a change, according to RKO, should be made in a rulemaking proceeding.[182] Additionally, RKO argues that it would be inappropriate and violate due process for the Commission to use the licensing functions to impose

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[179] 70 F. Supp. at 122, Accord, *Mansfield Journal Co.* v. *FCC*, *supra; TV-9, Inc.* v. *FCC*, 495 F.2d 929, 940 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Page Boy, Inc.*, 18 FCC 751 (1954), *affirmed per curiam sub nom. Klein* v. *FCC*, 232 F.2d 73 (D.C. Cir. 1956).

[180] Reply of RKO General, Inc. (RKO Reply Findings), September 24, 1979, at 30.

[181] Proposed Findings, Conclusions and Proffered Evidence of RKO General, Inc. (RKO Findings), August 27, 1979, at 77; RKO Reply Findings at 32, 33, 38.

[182] RKO Reply Findings at 38, 39.

penalties for non-broadcast misconduct or to enforce foreign or domestic laws which lie outside the Commission's jurisdiction.[183]

97. We believe that RKO's arguments rest on incorrect premises. It has never been the Commission's policy that renewal applicants could not be disqualified for illegal or improper non-broadcast conduct. Such a policy would, in effect, force us to close our eyes to conduct that could have a bearing on how a party would operate a broadcast station. Contrary to RKO's belief, the Commission has made its views regarding this matter quite clear. For instance, while we granted renewal of licenses in *Westinghouse Broadcasting, Inc., supra*, we also stated that we could draw inferences as to a licensee's future operation of its stations from a past record of non-observance of the law, *no matter how and where recorded*· "Involvement in lawbreaking in any area of activity may fairly be taken to indicate an uncertain quality or circumstance, the hazard of which need not be assumed." [184] We surely did not make the above statement without any intention of applying it when the facts justified such action. Thus, our action today does not mark a departure from "long-established precedent." Indeed, in a recent case, the Commission explained that non-broadcast misconduct alone might warrant a conclusion that an applicant could not be entrusted with a broadcast facility:

> [W]e cannot agree with the full implications of the Judge's ultimate conclusion . . . which is open to the interpretation that, in every case, a licensee's good broadcast record immunizes it against the effect of misconduct in the non-broadcast activities of the parent or of related corporations, so long as the licensee is not tainted by participation therein or has no

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[183] RKO Findings at 77-78.

[184] *Westinghouse Broadcasting, Inc., supra*, 44 FCC at 2783.

> knowledge thereof . . . Certainly some point is reached where, no matter how superlative a licensee's broadcast record and no matter how guiltless the licensee itself may be, the non-broadcast activities of a related corporation reach such a level of criminality that they cannot effectively immunize the licensee. We make no attempt here to say where the dividing line should be drawn and we are not faced with such a case here. Our purpose is only to serve notice that our affirmance of the Judge does not render unlawful conduct of an applicant in non-broadcast activities irrelevant . . . . Moreover, it should be perfectly obvious that if a corporation with both broadcast and non-broadcast activities ruls afoul of the law in conducting its non-broadcast affairs, it exposes itself to questions concerning its fitness to remain a licensee.[185]

98. In reviewing non-broadcast misconduct, then, we do not, as RKO suggests, use our decisions to enforce other laws. As we explained when we revised our renewal form in 1976,

> In exercising this authority [to consider violations of laws other than the Communications Act in passing upon an applicant's qualifications], our purpose is not to enforce the specific statutes and regulations violated or to otherwise encroach upon the responsibilities of the courts and other governmental agencies with respect to those laws. As the courts have recognized, our concern is properly directed to the con-

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[185] *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372, 406 (1976), *rev'd on other grounds sub nom., Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37 (D.C. Cir. 1978), *modified and rehearing denied*, 598 F.2d 68, *cert. dismissed*, 441 U.S. 957 (1979). The court, in vacating and remanding the Commission's order granting renewal of license to Cowles, stated that the Commission should consider the relevance of nonbroadcast wrongdoing by a related corporation sharing principal officers with the licensee. 598 F.2d at 52.

> duct underlying the violations of law and to determining the relevance and weight of such behavior on the applicant's ability to operate its station in a manner consistent with the public interest. [Citations omitted.] [186]

99. Our consideration of RKO's qualifications to be a Commission licensee, in this context, requires an examination of General Tire's improper activities. However, before we determine whether these activities reflect adversely upon RKO's qualifications, it is necessary that we explore the nature of the corporate relationship between General Tire and RKO.

b. Relationship between General Tire and RKO

100. As explained below, General Tire and RKO are, for all practical purposes, part of one unified organization. Not only does General Tire maintain legal control of RKO; the history of past and present corporate relationships reveals that the two companies keep abreast of each other's interests and work closely together when necessary to accommodate those interests. An understanding of our conclusions here begins with a short recitation of the companies' histories and corporate structures.

101. General Tire was founded in 1915 by William O'Neil who served as President and Chairman of the Board until 1960.[187] Presently, three sons of William O'Neil (T. F. O'Neil, M. G. O'Neil, and John O'Neil) are directors of the company. T. F. O'Neil is Chairman of the Board of General Tire. M. G. O'Neil is President of General Tire. John O'Neil is Chairman of General Tire's Finance Committee and Chairman of its Investment

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[186] *Revision of FCC Form 303*, 59 FCC 2d 750, 762 (1976).

[187] General Tire's Form 10-K filed with the Securities and Exchange Commission, SEC File No. 1-1520, February 24, 1979, Exhibit A ("1978 Annual Report") at 14.

Boards and Committees. T. F. O'Neil and M. G. O'Neil serve as two of the three members on the General Tire Executive Committee. T. F. O'Neil serves as Chairman of that Committee.[188] Prior to 1973, all directors on the General Tire Board of Directors either worked for the company and/or were members of the O'Neil family.[189] The three O'Neil brothers plus a sister, Grace O'Neil Regan, owned or controlled over nine percent of General Tire's total shares of stock outstanding as of June 30, 1979, more than enough to exert positive control over a company with approximately 50,000 stockholders.[190] The majority of General Tire's other shares of stock are also voted by the O'Neil family since T. F. O'Neil and M. G.

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[188] 1978 Annual Report at 30.

[189] Special Report at 33-34. The Special Report constitutes a judicial admission by which RKO is bound. The Special Report was prepared by a committee of General Tire's directors pursuant to the consent and undertaking executed by General Tire. Special Report at 33-39. RKO submitted this Report to the Commission. Moreover, RKO does not contest the accuracy of the findings contained in the Report. When the Commission was considering accepting the Special Report into evidence, RKO stated, "RKO is prepared to accept the relevant portions of the Report if the Commission should decide to reopen for the limited purpose of incorporating them in the record." Response of RKO General, Inc., October 28, 1977, at 35 n. **. See also RKO Reply Findings at 30: "RKO does not object to proposed findings concerning GTR to the extent that they are based on the Report". In its July 20, 1979 Order, the Commission reopened the record for the purpose of accepting into evidence the Special Report. Accordingly, we will treat the information contained in the Special Report as accurate.

[190] 1979 General Tire Ownership Report, Exhibit D, Attachment 2. John O'Neil is the beneficial owner of 348,347 shares of General Tire voting stock. M. G. O'Neil is the beneficial owner of 274,706 shares. T. F. O'Neil is the beneficial owner of 181,044 shares. Grace O'Neil Regan is the beneficial owner of 361,288 shares. J. T. Miller's beneficial ownership of 13,372 shares of General Tire voting stock comprises the next highest amount of voting stock beneficially owned by an officer or director of General Tire.

O'Neil have been appointed by management to vote shareholders' proxies.[191]

102. General Tire owns 100 percent of RKO's stock—none is presently available to the public.[192] In practice, General Tire's control over RKO is exercised by T. F. O'Neil, Chairman of the Board of RKO (as well as General Tire) and Chief Executive Officer of RKO.[193] T. F. O'Neil testified in this proceeding that he is accountable to the General Tire Board for the successful prosecution of RKO's operations.[194] Other members of the RKO Board of Directors are either RKO officers or associated with the O'Neil family. (William M. Regan, the husband of Grace O'Neil Regan is a director of RKO.)[195] According to RKO, although General Tire elects the members of the RKO Board of Directors, Chairman of the Boards T. F. O'Neil designates the members to be elected.[196] The RKO Board does not meet on a regular basis. Approval of written resolutions is often used in lieu of actual meetings.[197]

103. The particular corporate legal form used in General Tire's commercial activities seems to be strictly a matter of business convenience. Thus, although RKO is technically a subsidiary corporation, RKO, in effect, operates as one of General Tire's divisions.[198] By its own

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[191] SEC File No. 1-1520.

[192] FCC Form 323 Ownership Report for RKO, July 25, 1977 at 1 (1977 RKO Ownership Report); Special Report at 217.

[193] Special Report at 217-218; RKO Findings, Affidavit of T. F. O'Neil at 1; Tr. 7162.

[194] Tr. 7162-63; I.D. para. 12.

[195] 1977 RKO Ownership Report, Exhibit D; Special Report at 217 n. 114.

[196] RKO Findings at 54; T. F. O'Neil affidavit at 6.

[197] Special Report at 217 n. 114.

[198] General Tire is divided into three principal business operations. The first two, General Tire and Aerojet, are engaged primarily in

admission, RKO is used by its parent, General Tire, as an instrument to implement certain decisions. T. F. O'Neil explained in the Los Angeles comparative proceeding that when "it is corporately expedient for RKO General to make investments that normally might be made by General Tire . . . RKO makes the investments, rather than General Tire", and that "there are certain acquisitions that have been made by RKO General as a wholly-owned subsidiary of General Tire which may as well have been made by General Tire except that the corporate efficiency dictated that RKO General act there." [199]

104. General Tire's trade relations program illustrates the close working relationship between RKO and General Tire. When it came to trade relations with other companies, RKO was recognized as being part of the General Tire family by individuals both inside and outside the General Tire organization.

(1) *View From The Inside*

105. M. G. O'Neil recognized that General Tire and RKO had an identity of interests. O'Neil's April 21, 1961, memorandum formally announcing the establishment of a Trade Relations Division at General Tire contained the following language:

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manufacturing. RKO may be considered the Entertainment Division of General Tire. Proposed Findings and Conclusions of Fidelity Television, Inc. (Fidelity Findings), August 27, 1979, Ex. 11. RKO's subsidiaries likewise operate as divisons of RKO or General Tire. Cablecom-General, Inc. is a 97 percent subsidiary of RKO. RKO and Cablecom have interlocking boards of directors, and officers of RKO control the executive committee of Cablecom. Frontier Airlines is a 59 percent subsidiary of RKO. RKO and Frontier also have interlocking boards of directors. While RKO stresses that it does not participate in management of the airline, the principal executives of Frontier are former employees of Aerojet, another General Tire subsidiary.

[199] KHJ-TV Tr. 2321.

> With the expansion and diversification of all divisions of our company, the mutual interests of our customers and suppliers becomes an important factor in our operations . . . . To develop these relationships we are establishing a Trade Relations Division which will serve all segments of our corporate activities. The Division will, of necessity, establish a very close relationship with all sales and purchasing departments of our company, as well as all subsidiary operations.[200]

O'Neil's memorandum reflected an interest on the part of General Tire management to influence the business operations of its subsidiaries. Subsequent events demonstrate that this intent was carried out with respect to RKO. The following examples illustrate this point.

106. Robert Wilke, RKO's Director of Corporate Relations, had an interest in obtain PepsiCo's advertising for RKO stations. PepsiCo had an interest in arranging for its product to be sold at General Tire plants. On August 22, 1962, Wilke sent PepsiCo a list of 27 General Tire plant locations (including Aerojet and A. M. Byers plants). Wilke suggested that PepsiCo review the list, then contact him to "further discuss the continuation and expansion of a mutually beneficial association between our respective companies." [201] Later Wilke informed T. F. O'Neil regarding the "possibilities of expanding their [PepsiCo's] use of *our* broadcast facilities in conjunction with exposing Pepsi Cola to the employees of *our* several plants." [202] In a letter to the manager of General Tire's plant at Waco, Texas, Wilke spoke as if he represented the interests of General Tire as well as those of RKO when he stated:

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[200] Comm. Ex. 1, Doc. No. 06644.

[201] Fid. Ex. 141.

[202] Fid. Ex. 142 (emphasis added).

> I understand that someone from Akron has been in touch with you regarding our interest in Pepsi-Cola. Tom O'Neil has asked me to follow thru and thank you for any help you have given or will give the Waco Pepsi-Cola dealer in exposing his product in your plant. In addition to Tom's personal interest in this set-up we are in the process of developing considerable radio and television advertising business from the Pepsi-Cola Company here in New York and would in turn like to reciprocate by helping them obtain more business from the various General Tire Plants . . . . [A]ny help you can give him [the Waco Pepsi-Cola dealer] will work to our advantage in our own radio and television business.[203]

Wilke was also asked by PepsiCo to help get its local bottler more exposure in General Tire's Akron plants.[204]

107. Later, Wilke contacted an employee of RKO's movie theater division, Louise Wesson, to advise her that a local PepsiCo dealer had purchased all of his tires from General Tire and that any help she could give him would be appreciated.[205] Wesson was also requested to use the products of other good customers of General Tire.[206] Wesson did not comply satisfactorily.[207] As a result of Wesson's inaction, John Ragsdale, who directed General Tire's Trade Relations Division, sent a ringing memorandum to Wilke:

> I wonder as to the ethics of some woman employee of Video Theatres controlling on her own what goes into the concession stands. . . . I see no reason why we shouldn't have PepsiCola . . . in view of the fact

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[203] Fid. Ex. 148.

[204] Fid. Ex. 151.

[205] Fid. Ex. 96; Fid. Ex. 99.

[206] Fid. Ex. 101.

[207] See Fid. Ex. 100.

> they are a good customer of both RKO and the rest of the corporation.[208]

108. RKO-General Tire dealings involving insurance provide further evidence of how clearly the companies' interests were integrated. General Tire purchased group life insurance from Equitable Life Assurance Society.[209] Dissatisfied with Equitable's purchase of radio advertising, Harry Trenner, an RKO sales representative, wrote to his superior (with a copy to Ragsdale) concerning Equitable's failure to advertise on certain RKO stations.[210] Ragsdale then wrote Wilke:

> In view of the amount of business *we* give them [Equitable], I should think *we* could get on their list.[211]

An RKO official recommended that the "management of RKO *or* General Tire put pressure on the Equitable home office to assure *our* purchase." [212] Equitable eventually selected four RKO stations on which to advertise.[213] Although technically only an employee of General Tire, Ragsdale later wrote to an Equitable salesman and made it plain that he also represented the interests of RKO:

> As you are probably well aware, our RKO-General Division has been enjoying some of the Equitable's advertising business on a number of *our* stations for several years . . . . *Our* salesmen for RKO do not want to be overly aggressive with the agency and create any ill will that would put *us* in a bad light in the markets where *we* are being given considera-

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[208] Comm. Ex. 115, Doc. No. 1770.

[209] Fid. Ex. 108; KHJ-TV Tr. 3392-3393.

[210] Fid. Ex. 119.

[211] Fid. Ex. 120 (emphasis added).

[212] Fid. Ex. 218 (emphasis added).

[213] Fid. Ex. 108.

> tion, but *our* station management in the three stations which are not being given consideration do find it hard to reconcile the fact that they are not being given an opportunity to run advertising for Equitable.[214]

John O'Neil also took an interest in attracting Equitable advertising on RKO stations. He wrote Ragsdale: "I have been reading with interest and endorsement your correspondence about Equitable Insurance (sic) and who they do business with in the radio field. I would like to know how it all turns out."[215]

109. T. F. O'Neil also recognized a General Tire/RKO unity of interest. In a letter to the manager of an Aerojet commissary store, O'Neil stated:

> RKO General sells advertising time through its various radio and television stations to a great number of national companies of all sizes and descriptions. We are very much interested in being included in . . . General's survey of reciprocal business. Since Aerojet's commissary . . . must do a great deal of purchasing of consumer items we thought it might be fruitful for Bob Wilke of our outfit to make contact with you to see if there is any area of mutual advantage that might be exploited.[216]

Thus, O'Neil was willing to use the purchasing power of RKO's sister company, Aerojet, to increase RKO stations' advertising sales.

110. At almost every juncture, John Ragsdale, who had primary operational responsibility in the parent company for the reciprocal trade program, acted as if RKO and General Tire were really one company. The matters

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[214] Fid. Ex. 109 (emphasis added).

[215] Comm. Ex. 99, Doc. No. 06187.

[216] Fid. Ex. 198; Comm. Ex. 1.

described earlier involving PepsiCo and Equitable are two examples. There are others. In February 1963, Ragsdale wrote to an official of Humble Oil and Refining Company: "It certainly would be helpful if you could ask your advertising department to notify McCann-Erickson [Humble's radio and television advertising agency] of your interest in giving *us* some of this fine business."[217] Ragsdale also wrote Robert Wilke of RKO that he was negotiating with an official of Dow Chemical Company concerning business which General Tire could give them. During the course of negotiations, Ragsdale told the Dow official that they should "be using *our* owned and operated stations for their advertising."[218] Ragsdale similarly wrote to General Electric's manager of trade relations: "We would be very interested in trying to get some of your radio spot purchases in *our* RKO General organization."[219] In February 1963, Ragsdale wrote a letter to Wilke requesting that Wilke go to California:

> for the purpose of RKO-General. As you know, Aerojet does considerable business through its services and vending operations with companies that advertise on a national basis. I don't believe we have exploited this possibility anywhere near its fullest extent. It is true that we have Jim Filson [General Tire] out there and he is doing a good job on directing business to both San Francisco and Los

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[217] Fid. Ex. 89 (emphasis added).

[218] Comm. Ex. 92, Doc. No. 02350 (emphasis added).

[219] Comm. Ex. 107, Doc. No. 03142 (emphasis added). Ragsdale then wrote Wilke with a list of General Tire plants using General Electric bulbs. Comm. Ex. 107, Doc. No. 03141. Wilke, in return, wrote a General Electric official to remind him that RKO was a subsidiary of General Tire: "I would certainly appreciate your mentioning to Marty King in Cleveland that *RKO is a division of the General Tire Company*. I am sure an awareness of a mutually beneficial association between General Electric and General Tire will be helpful to us when Marty is directing the placing of his radio and television schedules." Fid. Ex. 155 (emphasis added).

> Angeles stations but I think with your broader experience and knowledge you could do a lot of good by meeting the people at Aerojet and becoming more thoroughly acquainted with their methods of operation.[220]

111. When James Filson of General Tire arranged to have Cardinet Candy vending machines installed in Aerojet plants, Cardinet agreed to a $10,000 advertising contract with RKO.[221] Harry Trenner of RKO wrote to Ragsdale in appreciation of Filson's services. Ragsdale replied to Trenner:

> Thank you so much for the letter regarding the work Jim Filson has been doing to help you folks. I feel very strongly that the Trade Relations Department can do a great deal to improve the business of *all of the divisions of our company* and certainly all of us are working towards that end. I am glad to see that you were able to get an order from Cardinet Candies as a result of Jim's work.[222]

Thus, Ragsdale certainly envisioned RKO as an integrated division of "our company", General Tire.

112. The above incidents demonstrate that General Tire and RKO officials and employees spoke and acted as though the companies were one. For all practical purposes, any theoretical separation between the companies was totally ignored when it served their common business interests.[223]

(2) View From the Outside

113. Numerous examples demonstrate that outsiders, as well as those inside the General Tire organization,

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[220] Fid. Ex. 130.

[221] Fid. Ex. 189 at 2.

[222] Comm. Ex. 102, Doc. No. 01909 (emphasis added).

[223] These examples have been chosen as a representative sampling and are by no means intended to be exhaustive. Numerous other

recognized General Tire and RKO as essentially integrated. This is significant in understanding the relationship of RKO and General Tire. For the facts demonstrate RKO and General Tire were willing to accept that view and exploit it to advance the interests of the General Tire organization (including RKO).

114. When Texaco feared that it would be replaced as General Tire's supplier in Casablanca, Morocco, Texaco did not approach a General Tire official; Texaco contacted Robert Wilke of RKO.[224] The general percep-

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illustrations of this point could have easily been selected without exhausting the records in the Los Angeles and Boston proceedings. For example, James Filson of General Tire, in a memorandum to his superior, John Ragsdale, reported a meeting with the head of advertising at Bekins Van & Storage Co. at which Harry Trenner of RKO was also present: "Bekins spends $750,000 a year on advertising and I think *we* may be able to get a portion of it." (Comm. Ex. 101, Doc. No. 61106) (emphasis added). In a letter to an Aerojet official, Filson recounted a discussion on advertising that he had had with an American Airlines official: "We enjoy a fine relationship with American and we are extremely interested in the *RKO* contract as *they are a part of the family*." (Fid. Ex. 209) (emphasis added). In a letter to an American Airlines executive, Robert Wilke expressed appreciation for "the opportunity to talk to you about *the scope of General Tire operation*. . . . I know that *our entire organization* will be very pleased if the RKO General radio stations are permitted to share in the forthcoming American Airlines campaign." (Fid. Ex. 152) (emphasis added.) C. F. Burke, an assistant to M. G. O'Neil at General Tire, sent letters to numerous General Tire suppliers for the purpose of introducing Robert Wilke to those companies so that Wilke might discuss placing advertising on RKO stations with them. (E.g., Comm. Ex. 92, Doc. 02353; Comm. Ex. 90, Doc. 06304; Comm. Ex. 93, Doc. 06385.)

[224] See Fid. Ex. 132. Wilke justified Texaco's faith in him. He wrote the following to Ragsdale:

> As you know our broadcast division has been favored with some excellent business from Texaco and we anticipate a continuation of this fine relationship . . . . It would certainly be to our best interest if the Texaco-General Tire relationship at Casablanca was continued and I will appreciate your efforts toward that end. Comm. Ex. 89, Doc. No. 05940.

tion of General Tire and RKO's ties was perhaps best reflected in the experience of William Denis Fugazy, President of Fugazy Travel Bureau, Inc. Fugazy Travel had obtained General Tire's travel business (General Tire, Aerojet and RKO) in return for its promise to advertise on RKO stations in an amount equal to 1½ percent of its gross billings to General Tire.[225] The agreement was worked out at a meeting attended by Wilke of RKO and Frank Duffy of General Tire, who was an assistant to M. G. O'Neil.[226] When the agreement broke down, due to a disagreement with General Tire's subsidiary, Aerojet, Fugazy wrote a letter to M. G. O'Neil requesting his assistance:[227]

> We of the Fugazy organization acted in good faith and believed that Mr. Duffy [General Tire] and Mr. Wilke [RKO] were speaking *for the corporation* when they assured us that Aerojet would cooperate in permitting us to service their travel needs . . . . I assure you of my full cooperation and of my continued respect and friendship for *the O'Neil family and the entire General Tire and RKO association.*[228]

115. A similar view was reflected by Lyon Van Lines, Inc. After agreeing to increase its advertising on RKO Station KHJ, Lyon wrote James Filson of General Tire: "Mr. Filson, you personally can take credit for this increase. Solely because of your trade relations program

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[225] Fid. Ex. 105.

[226] Fid. Ex. 105 and 153.

[227] Prior to writing M. G. O'Neil, Fugazy had solicited help from T. F. O'Neil: "I am sure by this time you have heard from my brother, Louis, concerning the rather difficult time we are having with the Aerojet account . . . I would appreciate your kind intervention in this matter." Fid. Ex. 226. Thus, Fugazy believed that T. F. O'Neil (the Chief Executive of RKO) could assist Fugazy in his dealings with a separate General Tire subsidiary.

[228] Fid. Ex. 228 (emphasis added).

we chose KHJ over other radio stations."[229] In a subsequent letter to Filson, Lyon stated:

> You repeatedly stressed the importance of trade relations with General Tire & Rubber Company to the personnel in our company who wished to receive moving and storage business from General Tire and its subsidiaries. Acting upon your suggestions we made certain that the products and services of *your Company, including radio station KHJ*, were purchased whenever possible . . . . We are confident that you will see that General Tire now keeps its part of the bargain and takes immediate steps to equalize the imbalance in Corporate Trade Relations between the Lyon Van & Storage Co. and the General Tire & Rubber Co. . . . .[230]

116. Again, the above examples are only intended as a representative sampling of the business community's perception that General Tire and RKO were one and the same company and are not intended to be exhaustive.[231]

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[229] Fid. Ex. 206.

[230] Comm. Ex. 88, Doc. 61404 (emphasis added).

[231] For instance, officials at Union Carbide, at one time the sole supplier of polygols to General Tire, recognized the General Tire-RKO connection. (Tr. 8088.) Dick Brown, an official at Union Carbide, reported to D. A. Kepler, a General Tire official, that Union Carbide had purchased over $40,000 advertising from RKO stations. Brown stated that he "felt that this information would be of interest to both Mr. O'Neil and you [Kepler]." (Comm. Ex. 90, Doc. No. 06302). In response to a threatening letter from Ragsdale, ("[I]t is becoming increasingly hard for me to convince our people that the lack of balance between Union Carbide and General Tire should continue"), H. Coffman, another Union Carbide official, submitted a list of all Union Carbide's purchases from General Tire, including advertising on RKO stations. (Comm. Ex. 90, Doc. Nos. 97213-14, 19760.) Jack Fleck, a Union Carbide salesman, advised his company after General Tire had agreed to purchase polygols from a competitor, Olin-Mathieson Chemical Company, that the "basis for the agreement is Olin's purchases of radio and television advertising from General's RKO affiliation . . . . We

117. The integrated relationship between General Tire and RKO was also recognized by one other interested outside party, the United States Department of Justice. On March 2, 1967, the Department filed a civil action alleging violations of the Sherman Antitrust Act against General Tire, RKO and other General Tire companies (Aerojet and A. M. Byers Company).[232] The complaint alleged that as early as 1961 the defendants engaged in "a combination and conspiracy to utilize reciprocity whereby *the purchasing power of all of said defendants* [was] used to coerce and persuade certain actual and potential suppliers of the defendants to purchase . . . advertising time and other products and services from said defendants, in unreasonable restraint of the aforesaid trade and commerce." [233] The October 21, 1970, consent decree terminating the Justice Department action bound both General Tire and RKO. It provided, *inter alia*, for the abolition of the position of Director of Corporate Relations at RKO (Robert Wilke's position) as well as the position of Director of General Tire's Trade Relations Division.[234]

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think this [General Tire's purchase of polygols] probably is an exchange of dollars on a fixed ratio in return for a fixed amount of advertising dollars." Fid. Ex. 197. Officials at Aluminum Company of America likewise recognized an RKO-General Tire connection. In response to a letter from a General Tire purchasing agent, R. C. Sharp, an Alcoa official, detailed all of Alcoa's purchases ($136,782) from the "various divisions of General Tire," including advertising on RKO stations (105,584). (Comm. Ex. 86, Doc. No. 1315). In response to a request from John Ragsdale, A. L. Vineyard of Alcoa similarly detailed all of Alcoa's purchases from General Tire ($120,391) including advertising on RKO ($100,298). (Comm. Ex. 86, Doc. No. 862).

[232] *United States* v. *The General Tire & Rubber Company, Aerojet-General Corporation, A. M. Byers Company and RKO General Incorporated,* C.A. No. C-67-155 (N.D. Ohio, E. Div., filed March 2, 1967).

[233] Complaint, C.A. No. C-67-155, para. 24(a).

[234] Final Judgment, C.A. No. C-67-155, Section IV A (entered October 21, 1970).

118. RKO asserts in its defense that its business operations are really autonomous and separate from General Tire.[235] It states that while General Tire has *de jure* control of RKO, General Tire and RKO operate independently of one another.[236] The only overlapping officer or director of RKO and General Tire, T. F. O'Neil, is said to be primarily concerned with RKO and "has no active role in General Tire's operations." [237] Moreover, T. F. O'Neil has indicated his intention to resign as Chairman and director of General Tire should the Commission find RKO qualified to remain a broadcast licensee.[238] RKO contends that the record and proffered evidence show that neither T. F. O'Neil nor any other RKO officer knew of or participated in General Tire's misconduct.[239] In addition, RKO states that neither M. G. O'Neii, the Chief Executive Officer of General Tire (whom the Report found responsible for a great deal of of General Tire (whom the Report found responsible for a

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[235] RKO Findings at 6, 88; RKO Reply Findings at 42-43.

[236] RKO Findings at 6, 88; RKO Reply Findings at 39.

[237] RKO Findings at 6, 88-89. According to F. T. O'neil, as Chairman of the Board of General Tire, his role is limited to presiding at and participating in meetings of General Tire shareholders and directors. O'Neil states that while he participates in discussions of overall business and financial matters of the kind that are generally presented to the board of directors at any major U.S. corporation, he does not give any instructions with respect to General Tire operations. O'Neil cites the declaring of stock dividends and corporate acquisitions as examples of the types of General Tire Board decisions in which he participates. T. F. O'Neil affidavit at 7-8.

[238] RKO Findings at 7, 88; T. F. O'Neil affidavit at 6; RKO Reply Findings at 43 n. **.

[239] T. F. O'Neil states in an affidavit that he did not participate in any of the "questionable transactions" referred to in the Special Report and that he did not know of any of these transactions at the time they occurred. He states that he learned of these activities "only as the result of subsequent reports both internally and by the Special Review Committee." T. F. O'Neil affidavit at 1-2.

great deal of General Tire's misconduct), nor any other person actively involved in directing the operations of General Tire is involved in the management and operation of RKO.[240] According to RKO, although General Tire, as RKO's sole shareholder, elects the members of RKO's Board of Directors, General Tire has allowed the focus of actual control to reside in RKO's Board under its Chairman, T. F. O'Neil.[241] Thus, RKO argues, the matters contained in the Special Report concerning General Tire's illegal and improper activities cannot be attributed to RKO and have no material bearing upon its qualifications as a broadcast licensee.[242]

119. A fair reading of the information before us reveals that RKO is not autonomous and separate from its parent, General Tire.[243] We base this conclusion both on formal ties of stock ownership and common leadership as well as on a history of cooperative action which indicates a close working relationship between the companies. The

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[240] RKO Findings at 6, 88; T. F. O'Neil affidavit at 7; RKO Reply Findings at 43.

[241] RKO Findings at 53, 89; RKO Reply Findings at 42.

[242] RKO Findings at 85; RKO Reply Findings, at 49.

[243] Our findings today are not unlike those of the Hearing Examiner in *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 149 (1969), who found that "General Tire and its subsidiaries are a highly integrated organization" and that "[o]ut of the conglomerate's headquarters comes policies which govern its activties." 44 FCC 2d at 155. He also explained that:

> taking the stand at hearing were numerous General Tire, RKO, and KHJ-TV executives and subordinates. None sought to turn his back on the fact that KHJ-TV is licensed to RKO, that RKO is a subsidiary of General Tire and Rubber, and that the rubber company is responsible for, and accountable for, the acts of the television station. In the field of corporate regulation the target for assessment of responsibility is not always so easy to find. It is to the credit of the applicant for renewal of license that no such problem is here presented. 44 FCC 2d at 218.

companies are owned, controlled and operated as a single integrated company.[244]

120. We simply cannot agree with RKO that the business operations of RKO have been operated independently from those of General Tire in the past. RKO at times has been operated as an integral component of the General Tire organization. Officials within and without this organization viewed General Tire and RKO as a single entity. Formal company boundaries were crossed regularly and frequently as RKO and General Tire officials and employees joined in an effort to use the purchasing power of one part of the conglomerate for the benefit of another.[245] As reflected above, General Tire and RKO employees spoke and acted as if they worked for a single company. RKO employees spoke of "our plants" when referring to General Tire plants. RKO employees similarly stated that "we spend" a lot of money when referring to General Tire corporate purchases. General Tire employees, on the other hand, referred to the RKO movie threatre division as "we." General Tire employees also referred to RKO's stations as "our stations" and spoke about other companies giving "us" some advertising business. General Tire officials referred to RKO as being part of "the family" and as one of the "divisions of the company." In addition, there was no doubt in the minds

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[244] Fidelity argues that even if RKO is considered to be autonomous from General Tire, the nature and scope of the General Tire misconduct is too egregious as to warrant RKO's disqualification by itself. In view of our holding today that RKO is not independent from General Tire, it is not necessary to decide whether General Tire's misconduct alone would warrant RKO's disqualification if RKO were in fact autonomous.

[245] We agree with the Broadcast Bureau's analysis that "[a]s part of an overall plan to improve the economic situation of the *corporate fmaily*, the record indicates that RKO's purchases and sales were used in determining business policies in other parts of the corporate entity of General Tire." Broadcast Bureau's Proposed Findings of Fact and Conclusions of Law, August 27, 1979, at 46 (emphasis added).

of many of General Tire's suppliers that when they purchased advertising from RKO, they were conducting business with a division of General Tire. Businesses recognized that if they wanted to sell products to the General Tire conglomerate they would be expected to reciprocate by advertising on RKO stations whenever possible.

121. RKO stresses that the members of the O'Neil family who are actively involved in "the company" participate in different fields of endeavor.[246] We do not argue with the fact that the O'Neil family appears to have divided the areas of responsibility—it is likely that M. G. O'Neil spends most of his time on a daily basis on matters concerned with General Tire and that T. F. O'Neil spends most of his time on a daily basis on matters concerned with RKO. It may be that General Tire is not regularly involved in day-to-day management of the RKO stations. However, it is quite obvious that this separation of business functions has been deferred the companies from working in unison whenever it has been in their self-interest to do so. At those times when there has been an identity of interests, General Tire and RKO have acted as one.

122. The General Tire corporate structure which existed in the 1960's (when the General Tire and RKO anticompetitive conduct occurred) still remains today. RKO is still wholly-owned by General Tire. The O'Neil family still controls General Tire.[247] T. F. O'Neil, Chairman of the Boards of General Tire and RKO, still controls

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[246] RKO Reply Findings at 45. We assume that RKO's use of the term "the company" refers to the entire General Tire conglomerate, including RKO.

[247] The September 21, 1976 proposal to "spin off" RKO from General Tire to its stockholders has no bearing on r decision. See para. 34, *supra*. Any such potential development does not negate the fact of misconduct which we must evaluate as part of this renewal proceeding. See *Jefferson Radio Company* v. *FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

the actions of RKO, and his brother, M. G. O'Neil, remains the chief executive officer of General Tire.[248]

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[248] In reaching our conclusion we need not decide the full extent of T. F. O'Neil's knowledge of General Tire's wrongdoing. Regardless of what T. F. O'Neil knew, the fact remains that General Tire can control and has controlled RKO operations. The reciprocity program is one example. Other examples are General Tire's broad policy directives to RKO and other subsidiaries concerning implementation of the 1970 trade relations consent decree and the 1976 SEC consent decree; also General Tire's Vice President and Controller serves as a member of RKO's audit committee (established pursuant to the recommendations of the Special Review Committee) and representatives of General Tire's accounting department attend RKO audit committee meetings. (T. F. O'Neil affidavit at 11.) It is equally clear that, regardless of T. F. O'Neil's knowledge, this Commission must depend on General Tire's willingness to be forthright with RKO since, as this case plainly demonstrates, we depend on RKO to report to us any relevant information concerning General Tire's activities. General Tire's own proclivity for misconduct —as well as its inclination (according to RKO) to withhold information from RKO—make it clear that we cannot trust General Tire to be forthright. (See RKO's Opposition, Appendix E.) Moreover, even if T. F. O'Neil were completely innocent of any wrongdoing, the fact remains that the General Tire Board, with M. G. O'Neil as a key director, retains the power to remove T. F. O'Neil and to appoint a successor. Thus, the character of General Tire and its board, as well as its record in employing and retaining persons (e.g., M. G. O'Neil) with a propensity to break the law or acquiesce in others doing so, is highly relevant to our assessment of RKO's qualifications to operate a broadcast station. Again, all of these concerns exist independently of any determination of what T. F. O'Neil knew concerning General Tire's misconduct and when he knew it. Some facts are known, however. The record is undisputed that in December 1975, RKO said it would consult with appropriate officials concerning Community's charges of General Tire's misconduct. As chief executive officer of RKO (and Chairman of General Tire's Board of Directors and Executive Committee), it is inconceivable that T. F. O'Neil was not advised then (if he did not know earlier) about General Tire's misconduct. Moreover, the General Tire Board of Directors was formally advised of the SEC investigation on January 23, 1976. Again, it is inconceivable that T. F. O'Neil did not learn then or shortly afterward (if he did not know before) about the General Tire misconduct. In short, if he was performing his chores at RKO and General Tire, T. F. O'Neil had to know about much or all of the General Tire misconduct

123. Since it has been shown that General Tire can control and has controlled the conduct of RKO, General Tire's willingness to respect proper standards of conduct is of very considerable concern to us. Therefore, in order to find RKO qualified to remain a licensee, the Commission must be able to trust General Tire to respect laws, rules, and policies concerning broadcast operations—especially those that require a broadcaster to be honest and forthcoming with this Commission.[249]

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before issuance of the Special Report (and in fact his affidavit clearly intimates as much). In addition, we need not consider T. F. O'Neil's suggestion that he would resign from General Tire's Board of Directors if the Commission renewed RKO's license. He has not done so to date. Moreover, T. F. O'Neil's removal from the General Tire Board would not remove the General Tire-RKO connection. General Tire would still own 100 percent of RKO and the O'Neil family would still control General Tire. Further, if T. F. O'Neil, while serving as General Tire's Chairman of the Board, was, as claimed, "kept in the dark" as to the company's illegal and improper activities, his removal from that position would not alleviate our concerns about General Tire's willingness to be forthwright with RKO.

[249] See *Mansfield Journal Co.* v. *FCC, supra,* 180 F.2d at 37, where the court stated:

> [T]he record shows that one family owns all of the stock in both corporations and that the owners took very active part in the control and policy formulation of the newspapers. We think the Commission was entitled to ascertain, and base its findings upon, the true locus of control. It could properly conclude that what had occurred in Mansfield was indicative of what might occur under similar circumstances in Lorain. This is not to disregard the fact that the two newspaper companies conduct separate businesses. It is rather to recognize that the true applicant in each of these cases is the same individual, or group of individuals, and that the Commission is empowered to consider the conduct and history of the applicant before deciding to grant the benefits represented by a broadcasting license. The Commission, in the words of Chief Justice Marshall, is entitled to "look beyond the corporate name, and notice the character of the individual." Bank of the United States v. Devenaux, 1809, 5 Cranch 61 at page 90, 3 L.Ed. 38. To carry out statutory

c. *General Tire's Misconduct*

124. Having found a close relationship between General Tire and RKO, we must now examine the misconduct of the parent corporation and evaluate the extent to which such misconduct affects RKO's fitness to operate Station WNAC-TV prospectively in the public interest. General Tire's misconduct is well documented in the Report of the Special Review Committee of the Board of Directors of General Tire. That report is the product of the parent corporation's own efforts pursuant to the consent and undertaking executed by General Tire.[250] The information contained in that report is not contested by RKO.[251] This evidence demonstrates that General Tire engaged in a pattern of serious misconduct over a lengthy period of time. This serious misconduct may be grouped into four categories:

(1) improper domestic political contributions;

(2) schemes which defrauded partly owned affiliate companies of millions of dollars, thereby cheating General Tire's partners in such companies;

(3) improper payments to foreign officials not only to obtain business but to prevent other firms from obtaining business;

(4) improper secret accounts designed to avoid foreign tax laws and foreign exchange laws.

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objectives, it is frequently necessary to seek out and give weight to the identity and characteristics of the controlling officers and stockholders of a corporation. [Citations omitted.] In the present situation the problem before the Commission is not whether the two newspaper companies constitute separate entities; it is rather a question of the probable conduct of the applicants as licensees.

[250] See Special Report at 33-39.

[251] See note 189, *supra*.

(1) Improper Domestic Political Contributions [252]

125. In 1968, at the initiation of its president, M. G. O'Neil, General Tire adopted a plan whereby selected employees were given special bonuses to enable them to make political contributions and pay their additional income tax without financial loss to themselves. The list of participants involved in the plan was composed by M. G. O'Neil. In 1970, scaled increases, the amounts of which were determined by M. G. O'Neil, were substituted for bonuses at the direction of O'Neil. The higher the salary increase, the greater the contribution expected from the participant.[253] A significant number of the participants felt an obligation to use the funds to make contributions. It was never suggested to the participants that they could contribute to the recipient of their choice. Recipients were selected by M. G. O'Neil. In some cases the employee-contributors were not even told to whom their contributions were given.[254] This contribution plan was terminated in 1972, after at least $80,000 in political contributions had been made.[255] Orders were given by M. G. O'Neil's assistant that no records be retained relating to the bonus/salary plan. M. G. O'Neil stated that he believed that these records had been destroyed. Not all the records were destroyed, however, because a lower General Tire employee was concerned about the ethics of destroying records and refused to follow the instructions given to her.[256]

126. Although the bonus/salary plan was abandoned in 1972, the improper political contributions continued for several years more. Because some recipients desired to receive contributions in cash, a cash fund was au-

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[252] Special Report at 2-5, 39-73.

[253] Special Report at 2, 42-45.

[254] Special Report at 2, 46-50, 51-54.

[255] Special Report at 3.

[256] Special Report at 70-71.

thorized by M. G. O'Neil in 1968. The envelope fund (so-called because the cash was kept in an envelope in a General Tire office safe) was maintained until 1975. The decision to terminate this plan was influenced by the mounting SEC inquiry. The principal source of money for the envelope fund was the above-mentioned bonus/salary plan. Almost all of the monies withdrawn from the envelope fund were used for political contributions or to reimburse M. G. O'Neil for his personal political contributions. The amount of money in this fund fluctuated between $18,000 and $20,000. Records relating to the envelope fund were destroyed.[257]

127. M. G. O'Neil has stated that he believed the bonus/salary plan was legal because, in his view, the increased payments belonged to the participants and political contributions under the plan were entirely voluntary.[258] However, in 1970, Tress E. Pittenger, Vice-President and former General Counsel of General Tire, had advised O'Neil that the plan would be legal only if the increases were compensation for services and the participant had a choice as to whether to make a contribution.[259] It is clear that these conditions were not satisfied and that M. G. O'Neil must have known this.[260] Employees were awarded increased compensation for the sole purpose of enabling them to make political contributions without using their normal compensation, and a significant number of employees felt an obligation to participate in the plan. Many "contributors" did not even know to whom they "voluntarily" contributed money. Thus, the Report states that the plan as implemented probably violated state law (Ohio Rev. Code § 3599.03)

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[257] Special Report at 4, 58-59, 71.

[258] Special Report at 2.

[259] Special Report at 2, 57.

[260] See Special Report at 19.

and federal law (18 U.S.C. § 610) which prohibit corporations from making political contributions.[261]

128. General Tire's political contributions were not confined to the bonus plan and the envelope fund. From the 1950's until the early 1970's General Tire also maintained an off-the-books cash fund in a grey metal box which was kept in the same office safe as the envelope fund. Money was obtained for this fund from a corporate account by a procedure designed to circumvent normal safeguards on corporate disbursements and to conceal the fact that the money was being used for political contributions. A total of $54,800 is estimated to have been disbursed from the fund between 1965 and 1970 to make direct political contributions or to reimburse General Tire officials for their political contributions. During an earlier period, 1958 through 1965, an estimated $20,000 to $40,000 was disbursed from the grey box fund each year. M. G. O'Neil was reimbursed from the grey box fund for his personal political contributions on several occasions. Records relating to the grey box were destroyed by General Tire. M. G. O'Neil has admitted that the grey box fund was illegal. The Special Report states that the grey box fund clearly violated state and federal laws prohibiting political contributions by corporations. The Special Report also declares that the grey box fund was improper because the fund was not recorded and because of the surreptitious procedures utilized for replenishing disbursements.[262]

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[261] Special Report at 56, 71-72. 18 U.S.C. § 610 was taken out of Title 18 (Criminal Code) and transferred to the Federal Election Campaign Act of 1971 (2 U.S.C. § 441(b)) as part of the Federal Election Campaign Act Amendments of 1976. The offense is punishable by a fine of up to $25,000 and/or up to one year imprisonment.

[262] Special Report at 3-5, 60-73. The Special Report states that the box fund clearly violated both 18 U.S.C. § 610 and Ohio Rev. Code § 3599.03. According to the Report, other federal and state statutes may have been violated by General Tire in connection with the box fund.

(2) *Defrauding Corporate Affiliates*

129. For at least 15 years, General Tire defrauded companies with which it was affiliated. This scheme relied on General Tire International Company (GTI), a wholly-owned subsidiary of General Tire which operates as a division of its parent.[263] GTI was organized in the 1930's to operate General Tire's sales and production activities abroad. It coordinates a world-wide network of affiliates. Although General Tire has some interest in those affiliates, they are separate companies and are generally under the formal control of parties other than General Tire.[264] However, top management personnel of many affiliates were GTI employees. Through these employees, GTI was able to control many of the affiliates' operations.[265] From at least the 1960's until 1975, GTI, as the result of a deliberate policy by its management, systematically overbilled, either directly or by arranging rebates to itself, its foreign affiliates and other foreign companies with which GTI had a contractual relationship. In other words, GTI defrauded the affiliates of substantial sums of money. During the years 1974 and 1975 alone, overbillings credited to GTI income accounts totaled more than $1,050,000.[266] Rebates received from

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[263] Special Report at 39. J. W. Foss, who was a President of GTI during much of the period that GTI defrauded its affiliates (1967 through 1974) was also a corporate Vice President of General Tire. Special Report at 187.

[264] Special Report at 108-109.

[265] Special Report at 109, 176.

[266] Special Report at 10, 176-183. GTI had contracts with the foreign affiliates to provide technical assistance for specified fees. Pursuant to these technical assistance contracts, GTI acted as procurement agent in purchasing machinery, equipment, and raw materials for the affiliates. The compensation to be paid GTI for this service was limited under the contracts to reimbursement of direct costs plus a technical procurement service fee of five percent of the purchase price. GTI systematically overbilled these affiliates by marking up prices it had paid to suppliers, by deliberately double-

1964 through 1975 and credited to income exceeded $4,000,000.[267] In most cases, such overbilling practices were kept secret from the affiliates. These practices violated GTI's contractual obligations as well as General Tire's fiduciary duties to other shareholders of the affiliates.[268]

(3) *Improper Foreign Payments*

130. Over the course of many years, GTI and General Tire affiliates bribed government officials in Morocco, Venezuela, Mexico, Iran, and Chile. In Morocco, a local agent was paid to secure government approval of a plant expansion and denial of a competitor's application. The payment was approved by GTI President J. W. Foss in the expectation that part of it would be paid to govern-

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charging freight and shipping charges, and by charging technical service procurement fees when no fee was contractually permitted. In one case, GTI continued to overcharge the affiliate even after it had been billed by the Agency for International Development for earlier overcharges. Special Report at 115-117.

[267] Special Report at 10, 183-187. When purchasing raw material for affiliates, GTI would secretly negotiate with the suppliers for rebates from the purchase price. By arrangement, the rebates were sent directly to corporate headquarters in Akron and taken as income to GTI. The affiliates were never told about the rebates.

[268] Special Report at 10, 176-187, 200-201. M. G. O'Neil denied knowledge of GTI's long-standing practices of overbilling foreign affiliates and cheating those affiliates out of rebates for raw material purchases. Special Report at 183, 187. For present purposes, we accept the denials as true. But as top operating official of the parent company, his "share" of responsibility for such flagrant disregard of General Tire's fiduciary obligations is considerable. See Special Report at 18. The tendency to cheat General Tire's foreign partners was "inherent in the structure of General Tire's international organization, and only positive and continuing vigilance [could] prevent abuses." Special Report at 201. Obviously, M. G. O'Neil could not be counted on to provide that vigilance. M. G. O'Neil's penchant for preserving his own ability to deny knowledge of illegality was explicit in the Fructal affair. Special Report at 152. See para. 133, *infra.*

ment officials. The application was approved five days after it was filed.[269] The local agent eventually was convicted on two counts of bribing government officials in connection with the plant expansion.[270] Money for the payoffs was generated by overbilling the General Tire affiliates for equipment used in the expansion.[271]

131. In other instances, pay-offs were made to government tax officials (Iran, Venezuela),[272] to customs and immigration officials (Morocco, Iran, Mexico),[273] to government purchasing agents (Mexico, Venezuela)[274] and to other officials in order to secure price increases (Mexico, Chile)[275] or to prohibit a potential competitor from entering the field (Chile).[276] Aside from these payments,

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[269] Special Report at 13, 112.

[270] Special Report at 114.

[271] Special Report at 13, 112-114. In another instance, the same local agent was retained by GTI to assist in extricating Aerojet from an unsuccessful joint venture with the Moroccan government. The agent went to Akron where he met with J. W. Foss and M. G. O'Neil. At least some GTI people expected that Moroccan government officials would be paid to secure Aerojet's release. An agreement was eventually reached whereby the Moroccan government purchased Aerojet's interest. The local agent was never paid due to his incarceration. Special Report at 14, 119-121.

[272] Special Report at 15, 205-207. In Venezuela, the payments were made not only to dissuade officials from pressing tax claims against the General Tire affiliate, but also to obtain confidential tax returns of competitors. Special Report at 15, 206.

[273] Special Report at 114-115, 204-205.

[274] Special Report at 207-208.

[275] Special Report at 138, 163-164.

[276] Special Report at 138. In Chile, monies were paid to an official to obtain government approval for a price increase and to induce the government not to authorize construction of a competing tire plant. INSA, General Tire's Chilean affiliate, had a monopoly on tires manufactured in Chile at that time. Payment was made by giving half of a torn card to two intermediaries. When matched, the card identified the man to whom the cash was given.

the Special Report cites numerous other instances where General Tire employees at affiliates were involved in improper or questionable payments to government or private officials.[277]

(4) *Improper Accounts*

132. GTI engaged in practices which were improper and probably violated the tax laws and currency exchange laws of most of the countries in which General Tire affiliates operated.[278] For example, GTI maintained "611" accounts and other "retention" accounts funded, in part, by overbilling its foreign affiliates.[279] The retention accounts on GTI's books allowed that company to make disbursements without paying foreign taxes or conforming with foreign exchange procedures.[280] Top management of General Tire and GTI, including M. G. O'Neil, knew of the existence and purposes of the 611 accounts.[281] The Special Report states that:

> since the main reason for retention accounts was to permit remittance of funds which could not be billed directly because of exchange problems, it follows al-

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[277] Special Report at 14-16, 137-143, 164-165, 208-214.

[278] Special Report at 11, 109-110, 140, 149-150, 163, 170, 189-190, 198, 207, 210, 215, 216.

[279] Special Report at 10-11, 190-191. During the 1960's there were twenty-one 611 accounts at various times which were used to record transactions with affiliates in fifteen foreign countries. These accounts were "retention" accounts in the sense that the funds were retained in Akron for the foreign affiliates. The accounts were, in effect, the property of the affiliates. Thus, GTI had a fiduciary obligation to the affiliates with respect to these accounts. However, the accounts were recorded on the books of GTI. The local stockholders and directors of General Tire's foreign affiliates were not aware of these accounts. Although recognizing the fiduciary nature of its role, GTI in many cases failed to treat the accounts in a manner appropriate for a fiduciary. Special Report at 11, 188, 199-201.

[280] Special Report at 10-11, 110, 190.

[281] Special Report at 197-198.

> most inevitably that all management personnel who knew about the accounts knew, or should have known, that their use probably violated the exchange laws of some countries. Similarly, management personnel should have known that the system at a minimum raised the possibility of violations of foreign tax laws.[282]

Numerous documents in GTI's files indicate that the retention arrangements were to be kept secret from foreign governments, who in several cases were the major shareholders in the affiliates. In some correspondence GTI personnel deliberately misidentified certain transactions in order to conceal their true nature from foreign authorities. General Tire memoranda also indicate that the manager of General Tire's tax department, as well as the vice president-controller of the corporate division, knew or should have known that the retention arrangements were intended to circumvent foreign exchange restrictions.[283]

133. Other improper secret accounts were maintained both in the United States and abroad.[284] The largest secret account was maintained by a Liechtenstein business organization known as Fructal Finanz Anstalt (Fructal). Fructal was funded largely through volume rebates which should have been directed to General Tire's Chilean affiliate, INSA. Although Fructal was funded by monies belonging to INSA, General Tire used Fructal as its own organization. The account was used primarily for improper activities: to avoid exchange controls and taxes and to launder questionable payments. The maintenance of the secret account violated Chilean law, as did the uses to which it was put. Although at least $1,814,725 was paid out from the Fructal account, only slightly more

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[282] Special Report at 198.

[283] Special Report at 199.

[284] Special Report at 8-10.

than a million dollars has been accounted for. High management officials at General Tire were aware of the existence and purpose of Fructal. The Special Report states that M. G. O'Neil knew of the existence of the fund from at least as early as 1965 and that O'Neil must bear major responsibility for the continued maintenance of Fructal as well as a share of the responsibility for the other improprieties found in the international affairs of General tire.[285]

(5) SEC Proceeding and RKO Defense

134. As noted on May 10, 1976, the Securities and Exchange Commission filed a Complaint for Injunctive and Certain Ancillary Relief (SEC Complaint) against General Tire and M. G. O'Neil.[286] The SEC alleged in its action that General Tire and M. G. O'Neil had engaged in acts and practices which constituted violations of Sections 10(b), 13(a) and 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78m(a) and 78n(a))[287] and SEC Rules 10b-5, 13a-1, 13a-13 and 14a-9. (17 C.F.R. § 240.10b-5, 240.13a-1, 240.13a-13 and 240.14a-9). Specifically, the SEC Complaint stated that General Tire and O'Neil, in connection with the purchase and sale of General Tire's securities, had employed and were employing schemes to defraud, had made and were making untrue statements of material fact, were withholding material facts which others had a right to know, and had engaged and were engaging in other business practices which had operated and were operating as a fraud and deceit upon General Tire's former,

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[285] Special Report at 7-8, 18, 126-154.

[286] *SEC* v. *The General Tire and Rubber Company and Michael Gerald O'Neil,* No. 76-0799 (D.D.C., consent injunction filed May 10, 1976).

[287] The maximum penalty for each willful violation of these provisions is a $10,000 fine and/or up to five years imprisonment.

current, and future stockholders.[288] As part of this violative conduct, the SEC alleged that:

> [S]ubstantial improper and illegal payments totalling in excess of several million dollars of corporate funds were made; domestic political contributions and improper payments to officials and employees of various governments were effected; the corporate books and records of General Tire were falsified and certain funds were maintained and not reflected on the corporate accounts of General Tire; violations of foreign currency laws occurred; [and] materially false and misleading annual and periodic reports and proxy statements were filed with the [Securities and Exchange] Commission [SEC].[289]

135. General Tire and M. G. O'Neil agreed to a consent decree. The consent decree did not admit or deny any of the allegations in the SEC Complaint.[290] However, the consent decree did provide for an investigation of the charges by the Special Review Committee (constituted of members of General Tire's Board of Directors) and the submission of a Special Report written by that committee.[291] While the consent decree did not represent an admission to any of the charges listed in the Complaint, the resulting Special Report did make findings and conclusions that confirm substantially all of the misconduct alleged in the Complaint.

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[288] First Cause of Action of SEC Complaint for Injunctive and Certain Ancillary Relief against the General Tire & Rubber Company and Michael Gerald O'Neil.

[289] *Id.*

[290] General Tire Consent and Undertaking. See Special Report, Appendix B at 1. Consent of Michael Gerald O'Neil. See Special Report, Appendix C at 1.

[291] General Tire Consent and Undertaking. See Special Report, Appendix B at 2-3.

136. RKO offers three factors in mitigation of the misconduct covered by the SEC complaint and documented in the Special Report: (1) the difficulty in complying with foreign laws; (2) the lack of articulated federal standards forbidding these activities; and (3) the fact that criminal charges were not brought against General Tire or its personnel.[292]

137. We have considered RKO's arguments. However, we do not believe that they offset the taint of General Tire's wrongdoing. First, although RKO argues that General Tire's personnel were subject to pressure and sometimes outright extortion by foreign officials, it has not attempted to substantiate this claim. Even assuming that pressure existed in certain cases, this would not sufficiently account for General Tire's propensity to engage in improper conduct that was anticompetitive in nature: paying officials in order to keep potential competitors out of countries and to obtain confidential tax returns of competitors. Similarly, foreign pressure was not exerted on General Tire to defraud its affiliates out of funds in excess of $4,800,000. In short, much of General Tire's foreign misconduct appears to have been completely voluntary. Indeed, the Special Report summed up General Tire's view toward foreign laws as follows: "a pervasive attitude of disrespect for and disregard of the laws of foreign nations in which General Tire does business has prevailed among management of GTI for many years." [293]

138. It is equally difficult to place much reliance on RKO's assertion that it was confused because federal standards were unclear. Many of the foreign activities

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[292] RKO Findings at 79-80, 81-84, 92-93; *Id.* Affidavit of Phillip K. Howard; RKO Reply Findings at 4-5, 34. Some of the defenses RKO asserts with respect to the wrongdoing discussed in the Special Report were also asserted with respect to other findings of wrongdoing. These latter defenses are discussed in part 6, *infra*.

[293] Special Report at 21-22.

enumerated in the Special Report were clearly improper: leaving $15,000 in a brown paper bag in a restaurant men's room in order to obtain a tax break; falsifying records to hide bribes; paying officials to secure the denial of competitors' applications to construct plants; obtaining records illegally; and cheating business partners.[294] In some cases General Tire management revealed that it too knew its practices were wrong. The procedure which was used to administer the "grey box" fund for domestic political contributions demonstrates that corporate officials knew that it was suspece.[295] M. G. O'Neil himself admitted that the scheme was illegal.[296] These illegalities and improprieties, then, did not result from unclear federal policy but from knowing corporate actions.[297]

139. The fact that criminal charges were not brought against General Tire is not determinative for our purposes. As we stated previously, another forum's decision whether to initiate a law suit often reflects a mix of factors having nothing to do with implementtation of the

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[294] Special Report at 10-11, 13, 15, 112-113, 114-117, 134-142, 144-150, 157-159, 161-163, 175-201, 205-209.

[295] Special Report at 61-66.

[296] Special Report at 68. We also note the Special Report's conclusion that Tress Pittenger and M. G. O'Neil should have known that the conditions for legality of the "bonus/salary plan" expressed by Pittenger would not likely be met. Special Report at 19. See para. 127, *supra*.

[297] Conclusions from the Special Report make it clear that, with respect to GTI's operations at least, RKO's excuses regarding unclear federal standards and foreign coercion are little more than post-hoc rationalizations: "The prevailing view of the procurement section of GTI, both in the eyes of those employed there and in the eyes of top operating management of GTI, was as a profit center whose responsibility was to charge "all the traffic would bear." . . . [This] policy led to the violation of laws and regulations of foreign countries and of the contractual and, more importantly, fiduciary-type duties of General Tire to affiliated companies not wholly-owned by it." Special Report at 200-201.

Communications Act. It has long been Commission policy (affirmed by numerous judicial decisions) that it is the conduct, not the type of lawsuit brought, which is critical in our evaluation of an applicant's qualifications to operate a broadcast facility.

140. In sum, none of RKO's defenses mitigate the wrongdoing detailed in the Special Report. Although perhaps not disqualifying by themselves, General Tire's illegal and improper practices must be given substantial weight in our examination of RKO's qualifications to be a broadcast licensee. These practices reflect a parental tolerance (and sometimes encouragement) of improper behavior and fiduciary neglect that could well infect any of General Tire's subsidiaries, including RKO.

d. Procedural Issues

141. RKO makes an additional argument which is pertinent to our above discussion regarding the impact of General Tire's misconduct on RKO's qualifications to remain a licensee. RKO maintains that, in the event it cannot be found qualified on the basis of existing record, it is entitled to a full evidentiary hearing, pursuant to Section 309(e) of the Communications Act, on the matters which are at issue in this proceeding. RKO contends that both Section 309(e) of the Communications Act[298] and the Administrative Procedure Act[299] impose an obligation on the Commission to identify prior to hearing those facts and legal theories it believes may merit action. In RKO's view, the Commission's July 20, 1979 request for pleadings concerning the Special Report did not provide RKO sufficient notice of the specific concerns of the Commission with respect to RKO's qualifications:

> While the pleadings and arguments of some of the parties in this case assert a host of factual and legal

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[298] 47 U.S.C. § 309(e).

[299] 5 U.S.C. § 554(b).

> issues stemming from the [Special] Report, the Commission has not yet specified which if any of these assertions would be "grounds and reasons" for denying the applications of RKO, nor has it specified "with particularity the matters and things in issue" . . . . If the Commission has any concerns about RKO's qualifications following its examination of the submissions under the July 20 Order, these concerns must be specifically articulated and RKO then given an opportunity for the full hearing required by Section 309(e).[300]

142. Additionally, RKO states that it has not been allowed sufficient time to gather together and place into evidence all of the relevant information it would have submitted if given an opportunity for hearing:

> In view of the fact, however, that only a short time was allowed for submission of this pleading, it was impossible to proffer all the evidence it [RKO] could offer if specific issues were designated for evidentiary hearing and the normal time period provided for the preparation of exhibits and live testimony for the hearing.[301]

143. RKO's argument that it must be accorded a full evidentiary hearing prior to the Commission taking any adverse action against it rests on two prongs: RKO contends that it must be given adequate notice of the matters at issue and that it must be afforded an opportunity to fully develop the record in support of its qualifications. We shall deal separately with these assertions.

(1) Right to specific notice

144. RKO is correct that it has a right to adequate notice of the issues to be considered against it. Section 309(e) provides as follows:

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[300] RKO Findings, Appendix A at 2-3.

[301] RKO Findings at 2 n.*.

> If . . . a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest] finding . . ., it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally . . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate . . . .

Section 554(b) (formerly Section 5(b)) of the Administrative Procedure Act provides that "persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b).

145. Neither the Communications Act nor the Administrative Procedure Act specifies the precise form in which parties are to be advised of issues being considered by the agency. This lack of specificity flows from the purposes to be served by the notice requirements. Notice is designed to alert a party to matters of interest to the agency so that the party can take advantage of any opportunities to file comments or otherwise participate in the proceeding. It is that goal that underlies the statutory notice requirements. As the United States Court of Appeals observed,

> [d]esignations for hearing, like pleadings under modern procedure, are for *the purpose of reasonably apprising the party of the issues involved*, and are not to be struck down for non-prejudicial deficiencies. [Citation omitted.][302]

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[302] *Mansfield Journal Co.* v. *FCC*, *supra*, 180 F.2d at 36 (emphasis added).

146. Here, RKO has been reasonably apprised of the matters at issue.[303] Hence, it has not been prejudiced by the Commission's failure to issue a specific designation order.

147. In order to understand our rationale for this conclusion it is necessary to first outline the notice procedures usually followed in hearing cases. Ordinarily, the Commission issues an order when it designates a license application hearing. The designation order sets forth specific factual questions to be explored at the hearing. The designation order usually ends with a conclusory question concerning the license applicant's basic qualifications to be a broadcast licensee. Within a short time after release of the designation order, the Broadcast Bureau releases a bill of particulars which describes in greater detail the factual support for the questions raised in the Commission's designation order. Sometimes, however, the Commission does not issue a bill of particulars but instead issues an opinion with its designation order.

148. RKO is correct that this procedure was not followed precisely with respect to the General Tire misconduct considered above. However, it is a distinction without a difference. RKO has long been on notice regarding the issue of General Tire's misconduct and its possible impact upon RKO's qualifications to be a Commission licensee.

149. As noted previously, Community's December 10, 1975, Petition to Reopen cited specific illegal and improper General Tire conduct and alleged that this misconduct was disqualifying. Following RKO's submission of the Special Report, Community filed a pleading which

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[303] Our discussion herein deals solely with General Tire's misconduct and its impact on RKO's qualifications. RKO's anticompetitive activities were previously considered in an evidentiary proceeding. For a discussion notice with respect to RKO's knowing filing of inaccurate Annual Financial Reports, and its lack of candor, see 193-195 and 219-221, *infra*.

requested that the Commission reopen the record to accept the Special Report and that the Commission deny RKO's application for renewal of license for WNAC-TV,[304] Community noted in its Motion to Deny Renewal that throughout the Boston proceeding it had submitted pleadings which "laid bare a continuing pattern of illegality and impropriety permeating RKO and its nuclear family." [305] Drawing on information contained in the Special Report, Community's Motion to Deny Renewal summarized these "documented misdeeds that reflect on RKO's fitness to hold a broadcast license.[306] On December 15, 1977, Community filed a reply to RKO's response to its Motion to Deny Renewal, Community's reply again requested, based on the findings in the Special Report, that the Commission reopen the record to accept the Special Report and that it deny RKO's application for renewal of license.

150. Thus, Community's pleadings gave ample notice that General Tire's misconduct and its disqualifying impact on RKO were in issue.[307] We subsequently provided RKO adequate notice of the Commission's intention to explore this issue. In its Order of June 28, 1979,[308] the Commission directed the parties to file summaries of their positions and to present oral argument on the conclusory issues of whether the record was sufficient to make a judgment as to RKO's qualifications, and if so, what the

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[304] Motion by Community Broadcasting of Boston to Deny RKO's License Renewal or, In the Alternative Hold Further Evidentiary Hearings (Motion to Deny Renewal), September 13, 1977, at 30-31.

[305] *Id.* at 2-3. Community cited numerous pleadings filed in conjunction with or in response to its 1975 Petition to Reopen. Community found further support for its motion to deny in the *amici* brief filed by NCCB.

[306] Motion to Deny Renewal at 5.

[307] See *Harbenito Broadcasting Co.* v. *FCC*, 218 F.2d 28, 31 (D.C. Cir. 1954), wherein the court held that a party was given notice of an issue by the discussion in an adversary pleading.

[308] FCC 79-403 (June 28, 1979).

judgment should be. The Commission specifically indicated in its Order that the matters raised in Community's December 10, 1975, Petition to Reopen and related pleadings were under consideration.[309] Following oral argument, the Commission reopend the record for the purpose of accepting into evidence the Special Report. The Report contains far more information and specificity than is normally provided in a designation order or a bill of particulars. The Commission's Order of July 20, 1979 also indicated that the findings and conclusions of the Special Report were in issue. Indeed, the Order explicitly directed RKO to make a particularized proffer of evidence to mitigate the findings and conclusions of the Special Report. The Order additionally requested findings and conclusions from all parties, including RKO, on the nature of the relationship between General Tire and RKO (including their officers, directors and employees) and the implications of such a relationship in evaluating the matters set forth in the Special Report. RKO surely understood that General Tire's misconduct was in issue here: it devoted many pages of its subsequently filed Findings and Reply Findings to a discussion of why that misconduct need not taint RKO. Thus, RKO can hardly argue at this date that it needed notice that General Tire's misconduct and its effect on RKO were at issue.

151. RKO nevertheless contends that it had no idea which matters in the Special Report were of interest to the Commission and accordingly had difficulties in preparing a response.[310] This argument patently lacks merit. The Commission's Order of July 20, 1979 made it clear that the Commission was concerned about the *entire*

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[309] It is notable that RKO's summary "assumes for the purposes of the questions posed for oral argument that 'the record in this proceeding' comprises . . . all post-Initial Decision pleadings in this proceeding and the [Special] Report." Summary of RKO's Position on Questions for Oral Argument, July 9, 1979, at 2 n.*.

[310] RKO Findings, Appendix A at 2-3.

report. RKO was invited to "make a particularized proffer of specific evidence that it would introduce, if given the opportunity to mitigate the findings and conclusions of the 'Special Report'." [311] All parties were further invited to submit proposed findings of fact and conclusions of law concerning all the matters set forth in the Special Report. The Commission also expressed particular concern with respect to RKO's relationship with General Tire and invited parties to submit findings and conclusions on that point as well. In short, the Commission's Order showed that the Commission was concerned with *every aspect* of the Special Report. As RKO no doubt knew, the Commission would not confine its inquiry to only "major areas" of misconduct since the Commission has long held that an applicant's qualifications "cannot be [determined] on the basis of isolated facts, but should include a careful, critical analysis of all pertinent conduct of the applicant." [312] If there were areas of discussion in the Special Report that RKO felt were irrelevant, the Commission's Order of July 20, 1979 gave RKO ample opportunity to make its case. In the absence of such a proffer, all parties had to realize (and in fact their pleadings reflect their realization) that all matters covered by the Special Report were of interest to the Commission.[313]

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[311] FCC 79-453 (July 20, 1979).

[312] *Violation by Applicants of Laws of U.S., supra,* 42 FCC 2d at 401.

[313] It is significant that RKO did not request an additional extension of time to enable it to gather further material. In an August 14, 1979 Motion, RKO did request an extension of five business days because of its difficulty in obtaining affidavits from prospective affiants "located in various parts of the country" and because of the overlapping vacation times of the affiants and those people involved in preparing RKO's Proposed Findings. The Commission granted RKO's request by an Order, FCC 79M-945, released August 15, 1979. RKO later requested an extension of five business days to respond to the other parties' proposed findings because of the "large amount of material involved." The Commission again granted RKO's request by an Order, FCC 79-1083, released September 19, 1979. In neither of its requests did RKO indicate that it needed additional time in

152. The cases cited by RKO do not support its claim that it lacked sufficient notice and that therefore further proceedings are necessary. In *Hess & Clark* v. *Food & Drug Administration*,[314] the FDA was faulted for basing its decision on developments which occurred only after its notice was issued. In other words, the notice did not contain data (test results) upon which the agency ultimately relied. Here, we rely on information (the Special Report) which the licensee has had in its possession for almost three years (and which was authored by its own board of directors). In *Rodale Press, Inc.* v. *Federal Trade Commission*,[315] the FTC changed its theory between the time of the notice and the issuance of the decision. The agency issued a complaint under one theory (that advertisements accurately represented certain publications but that there were false claims in both the advertisements and the publications. After holding a hearing, the agency sustained the complaint on a contrary theory (that the advertisements inaccurately represented the publications). In the instant proceeding we have not changed theories after notice. Thus, neither *Hess* nor *Rodale* is applicable here.

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order to develop more evidence. RKO claims that it did not request such an additional extension because it believed the existing record, supplemented by its proffer of proof, would be sufficient to find RKO qualified to hold a license for WNAC-TV. RKO Findings, Appendix A at 3n.*. If RKO failed to request an extension because it believed that no material facts were in dispute, it cannot be heard to complain now because the Commission agreed with it as to this point but disagreed with it as to the ultimate conclusions reached from those undisputed facts. When RKO failed to request an extension of time to prepare additional relevant evidence, it made a tactical judgment that the Commission would not render a decision adverse to RKO's interests based on the record before it. Having decided not to proffer all of its alleged evidence when it had the opportunity, RKO has no right to a further hearing on any evidence it has withheld. See *CAB v. State Airlines*, 338 U.S. 572, 579-81 (1950).

[314] 495 F.2d 975 (D.C. Cir. 1974).

[315] 407 F.2d 1252 (D.C. Cir. 1968).

153. In short, RKO has had fair notice that General Tire's misconduct was in issue and has had numerous opportunities to address the matter. The fact that it has used those opportunities to present evidence and arguments (in response to Community's charges, in oral argument before this Commission and in mitigation of the findings of the Special Report) shows that it fully understood this issue and its significance throughout this proceeding.

(2) Opportunity to Develop the Record

154. Section 309(e) of the Communications Act specifies that an application for license will be designated for hearing and issues specified where a substantial and material question of fact is presented or the Commission is unable to make the necessary public interest findings. Thus, the Section 309(e) hearing requirement may be triggered in one of two ways: a party may raise substantial and material factual questions in a petition to deny or the Commission may lack sufficient information on which to make an informed judgment. In this case there is no dispute as to the material facts upon which our determination is predicated. Moreover, there is no material information that must be obtained in order to reach a determination on the public interest. Therefore, a full evidentiary hearing would serve no purpose.

155. The Commission has previously held that Section 309(e) does not always require a full evidentiary hearing prior to the denial of a renewal application. In *Joe L. Smith, Jr., Inc.*, the Commission denied a licensee's renewal application without an evidentiary hearing.[316] The relevant facts had been presented in written pleadings and at oral argument and the Commission concluded that

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[316] 1 FCC 2d 666 (1965). *Accord, United Television Co., Inc.*, 46 FCC 2d, 698 (1974), *affirmed per curiam*, 514 F.2d 279 (D.C. Cir. 1975).

there were "no material questions of fact . . . in dispute . . ." [317]

156. The courts have likewise stated that, despite the language of Section 309(e), a hearing is not necessary if the Commission decides that there are no material facts in dispute and that a hearing would serve no purpose. In the recently decided case, *United States* v. *FCC*, the court cited with approval from an earlier court decision that

> [a] hearing is not necessary where the Commission's decision is based on inferences and conclusions drawn from undisputed facts. Petitioner does not dispute any of the material facts on which the Commission's conclusions rest, but asserts only that insufficient facts were adduced to make a public interest finding. *Network Project* v. *FCC*, 511 F.2d 786, 796 (D.C. Cir. 1975).[318]

Thus, where there are no disputed questions of material fact, but merely questions as to the inferences to be drawn or weight to be given to those undisputed facts, and the Commission has enough information to make an informed judgment, a hearing is not necessary.[319] Even

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[317] *Id.* at 668. It is noteworthy that, although the Commission said it considered the facts in a light most favorable to the applicant, the Commission drew inferences from the facts that were adverse to the applicant.

[318] *United States* v. *FCC*, Dkt. No. 77-1249 (D.C. Cir. March 7, 1980), slip op. at 12. Although that decision involved a different fact setting, its discussion of Section 309(e) is applicable here. See also *March* v. *FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970): "Only where the public interest cannot be determined without resolution of disputed facts has Congress dictated that the Commission must conduct a hearing. This is the clear meaning of Section 309 of the Act."

[319] This view of Section 309(e) is consistent with judicial interpretations of other statutes that appear to mandate hearings regardless of their utility:

> The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve

RKO agrees that Section 309(e) does not require a hearing here if it would serve no useful purpose.[320]

157. In deciding whether hearings are necessary, a preliminary judgment must be made as to whether the record is sufficiently complete. The courts have recognized that it is the Commission which must decide that question: "Someone must decide when enough data is enough. In the first instance that decision must be by the Commission—not by . . . the parties to the proceeding." [321]

158. In the instant case the record is sufficiently complete and there are no material questions of fact that need to be resolved before making our decision. The evidence relied upon in reaching our decision in this section comes from these basic sources: (a) the evidence

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> absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided by statute.

Independent Bankers Association v. *Board of Governors of the Federal Reserve System,* 516 F.2d 1206, 1220 (D.C. Cir. 1975). See also *United States* v. *Cheramie BoTruc #5, Inc.,* 538 F.2d 696, 698 (5th Cir. 1975):

> A long line of cases establishes the rule that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the APA requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed.

[320] RKO Findings, Appendix A at 4.

[321] *United States* v. *FCC, supra,* slip op. at 39. See *Columbus Broadcasting Coalition* v. *FCC,* 505 F.2d 320, 324 (D.C. Cir. 1974):

> [T]he decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and expertise is paramount. We must examine the Commission's statement of reasons for denial, and if the Commission's action was not arbitrary, capricious or unreasonable, we must affirm.

See also *West Michigan Telecasters, Inc.* v. *FCC,* 396 F.2d 688, 691 (D.C. Cir. 1968): "[I]t is clear that the decision of when hearings are necessary or desirable to clarify issues is one which lies in the first instance with the Commission."

adduced pursuant to a full evidentiary hearing; (b) the facts set forth in the Special Report; and (c) information contained in the parties' pleadings. There is no need for a further hearing as to the evidence we relied upon in assessing General Tire's misconduct:

(a) To the extent RKO has already been provided a full evidentiary hearing with respect to that evidence, no additional inquiry is necessary.

(b) To the extent the evidence relies on the Special Report's findings, RKO has not disputed it. In its October 28, 1977 Response to Community's Motion to Deny License, RKO stated that it was "prepared to accept the relevant portions of the [Special] Report if the Commission should decide to reopen for the limited purpose of incorporating them in the record." [322] In its August 27, 1979 Proposed Findings, RKO made "[n]o attempt . . . to justify or seek condonation of GTR's [General Tire's] questioned overseas or domestic activities." [323] In its September 24, 1979 Reply, RKO added that it did "not object to proposed findings concerning GTR [General Tire] to the extent that they are based on the Report." [324] Moreover, the Special Report is in the nature of an admission since it was written by General Tire's own directors.

(c) To the extent the evidence relies on the affidavits and other information in the parties' pleadings, RKO has no basis for objection because we have used only that material as to which there is no factual dispute. Indeed, after Community had filed its Motion to Deny Renewal, RKO argued that a hearing was not necessary since neither Community nor Dudley had raised new facts:

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[322] Response of RKO General, Inc. at 35 n.* *. The Commission did incorporate the entire Special Report into the record by Order FCC 79-453 (July 20, 1979).

[323] RKO Findings at 5.

[324] RKO Reply Findings at 30.

> Even if the record is reopened, there is no need for an evidentiary hearing. This case is unique in that the facts concerning the conduct which the parties urge the Commission to consider as the basis for impugning RKO's character have already been developed by the Review Committee and set forth in detail in its Report. Accordingly, a hearing which would be largely redundant of matters already established would be an unnecessary waste of the Commission's resources and contrary to the public interest in avoiding time-consuming hearings, whenever possible and in administrative finality . . . . None of the essential facts relied upon by Community and Dudley as the basis of their requests for further hearing is in dispute, [footnote omitted] and there is nothing in the pleadings before the Commission which suggests that a hearing would develop any different facts which are material. Now that the facts which might arguably have a bearing on RKO's qualifications to operate WNAC-TV are before the Commission and the resolution of Community's and Dudley's claims regarding the impact of the Report on RKO's character turns on the inferences and legal conclusions to be drawn from those facts, the Commission would be well within its authority in deciding this case without holding a further evidentiary hearing.[325]

Nothing has happened that would afford RKO a reasonable basis for changing that position. RKO itself has acknowledged in its most recent pleadings that no other party has proffered any additional evidence at all, let alone evidence that would require a hearing.[326]

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[325] Response of RKO General, Inc. at 34-36 (citations omitted).

[326] RKO Reply Findings at 5.

159. Thus, there is no dispute with respect to the essential facts on which we rely concerning General Tire's misconduct. For example, RKO does not dispute that M. G. O'Neil initiated illegal schemes to make improper corporate political contributions. RKO does not deny that GTI, a wholly-owned subsidiary of General Tire which is operated as a division of the parent, defrauded General Tire's foreign affiliates.

160. Nor are there any unresolved substantial material facts regarding RKO's relationship to General Tire. There is no dispute that General Tire owns 100 percent of the stock of RKO. There is no dispute that the O'Neil family controls a relatively large portion of General Tire stock. There is no dispute that T. F. O'Neil is Chairman of the Board of both RKO and General Tire and serves as Chairman of General Tire's Executive Committee. There is no dispute that RKO took part in an overall plan to improve the economic situation of the entire General Tire corporate family.

161. Rather than disputing any of the material facts regarding General Tire's misconduct, RKO disputes the inferences drawn from these facts—whether the facts of General Tire's misconduct and General Tire's relationship with RKO should have an adverse impact on RKO's qualifications. In effect, RKO argues that these known facts are insufficient to justify findings adverse to it. This contention poses only a legal question on which a hearing is unnecessary.[327]

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[327] Section 409(a) of the Communications Act specifies the procedure to be followed in a Commission hearing. 47 U.S.C. § 409(a). We recognize our obligation to conform to that section where it applies. *See Channel 16 of Rhode Island* v. *FCC*, 229 F.2d 520 (D.C. Cir. 1956) (grant of television station construction permit reversed). However, Section 409(a) applies only to "case[s] of adjudication . . . which [have] been designated by the Commission for hearing." There are no substantial and material questions of fact remaining with respect to General Tire's misconduct (or the other issues resolved here). Consequently, since we are able to reach a decision on the WNAC-TV renewal application without designating those issues for hearing, Section 409 does not apply to this case.

(3) Conclusion

162. RKO has been accorded numerous chances to submit relevant information, including proposed findings of fact and conclusions of law, with respect to General Tire's misconduct and the relationship of General Tire and RKO. It has taken advantage of that opportunity and we have accepted RKO's proffer of proof. RKO also took part in an oral argument which covered these matters. There are no substantial and material facts in controversy, only inferences and conclusions to be drawn from these undisputed facts. The Commission possesses all the information reasonably necessary to make a proper public interest determination. An evidentiary-type proceeding would serve no useful purpose. In view of these factors, we believe our decision not to conduct an evidentiary hearing on the matters discussed in this section is reasonable.

4. Filing of Inaccurate Annual Financial Reports

a. Introduction

163. RKO concedes that it filed inaccurate Annual Financial Reports (FCC Form 324) by incorrectly stating the value of trades and barters.[328] RKO maintains, however, that the errors were unintentional and do not reflect on its qualifications to remain a licensee.[329] Fidelity, on the other hand, asserts that RKO knew its financial reports were inaccurate when submitted, and consequently, that the licensee made knowing misrepresentations to the Commission.[330] Fidelity also asserts that RKO "totally abandoned" its licensee responsibilities by failing to establish accounting policies that would assure compliance with the Commission's reporting requirements.[331]

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[328] RKO Findings at 14.

[329] *Id.* at 69.

[330] Fidelity Reply Findings at 20.

[331] Fidelity Findings at 113.

164. As explained in greater detail below, the record unmistakably demonstrates that RKO knowingly certified to the Commission that certain financial reports were complete and accurate when RKO knew otherwise. To some extent, the accounting practices of RKO did reflect a lack of control. But of far greater significance to us is RKO's willingness to disregard facts in its possession and to mislead the Commission into believing that the RKO financial reports accurately reflected the true state of facts known to RKO. This resort to willful and repeated misrepresentation warrants disqualification by itself. And certainly when considered along with the other misconduct discussed in this opinion, it is clear that RKO does not possess the requisite qualifications to be a broadcast licensee.

b. False Certification of Annual Reports

(1) Sequence of Events

165. As explained earlier, barter and trade transactions are exchanges of a station's broadcast time at something other than normal advertising rates and usually involve the broadcaster's receipt of the advertiser's goods or services.[332] These transactions are a common practice in the broadcast industry, and the Commission neither prohibits nor regulates them. The Commission does require, however, that the value of these transactions be reported on licensee annual financial reports. In February, 1972, the Commission issued a *Public Notice* reminding licensees that barter and trade considerations were to be reported on FCC annual financial reports. The *Notice* also explained how to treat the revenues and expenses of different types of transactions.[333] This meant that such transactions would have to be fully

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[332] See *Kaye-Smith Enterprises*, 71 FCC2d 1402, 1407 (1979).

[333] *In Re Reporting "Trade Outs" on FCC Broadcast Financial Reports*, 34 FCC2d 439 (1972).

accounted for in financial reports to be filed in April, 1973, to cover the 1972 fiscal year.[334]

166. Prior to 1976, several methods of accounting for barters were utilized within the broadcast industry. One method was to account for barters through the use of memoranda. Under the "memorandum" method, the amount of air time used and the receipt and disposition of barter consideration were recorded on memoranda that were kept separate from, and were not recorded in, the general ledger and financial statements of the broadcaster. The other method was to enter these transactions in the general ledger and include them in the financial statements.

167. Prior to issuance of the *Notice*, RKO had been using the memorandum method to account for barter and trade transactions. At the time, this method was consistent with accepted accounting standards. However, on March 13, 1972, RKO's controller, John Fitzgerald, recommended to RKO's President, John Poor, that, in light of the *Notice*, the company should begin to record barter and trade in its general ledgers and financial statements.[335] Fitzgerald believed that entering these transactions on the general ledger would afford RKO better accounting controls.[336] Poor rejected Fitzgerald's recommendation, citing internal business reasons.[337] Poor made

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[334] RKO's fiscal year was from December 1 to November 30. The Commission requires that annual financial reports be filed by April 1 of the following year.

[335] RKO Findings, Affidavit of John Fitzgerald at 2-3; Special Report at 223. For the purposes of this opinion (except as explained below in paras. 178, 179, and 182), we presume the truth of the facts set forth in RKO's affidavits and proffer of evidence.

[336] Special Report at 223.

[337] Poor stated that he accepted the views of RKO's radio and television division heads, who believed the proposed change would cause unnecessary intrusion by Fitzgerald's department into operational decisions properly made by individual station managers. RKO Findings, Affidavit of John Poor at 6-7.

his decision after receiving assurances from RKO's independent accountants that the memorandum method was consistent with then accepted accounting principles.[338] Both Poor and Fitzgerald stated that they believed at the time that the memorandum technique, if properly implemented, could provide adequate controls.[339]

168. Within nine months, however, Fitzgerald made it clear in an internal memorandum that the records were still incomplete and that additional measures were necessary. Specifically, in a memorandum to all station controllers, dated December 7, 1972, Fitzgerald noted that there was still "some confusion" as to the status of these trade agreements, caused primarily by "the lack of adequate records reflecting the goods or services received and the advertising spots which had been run." Fitzgerald pointed out that this constituted "a weakness in [RKO's] control of [barter transactions] which must be corrected" since the FCC required "an accurate accounting of these transactions." [340] Fitzgerald therefore knew that the records for RKO's 1972 fiscal year (which ended November 30, 1972) were incomplete with respect to barter and trade transactions and that RKO's revenue and expense figures would have to be more than were otherwise known at the time; nonetheless, Fitzgerald submitted the financial reports for 1972 and certified to the Commission that they were complete and accurate.[341]

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[338] Poor affidavit at 7; Special Report at 223.

[339] Poor affidavit at 7; Fitzgerald affidavit at 3.

[340] Fitzgerald affidavit, Att. A.

[341] Fitzgerald maintains that he did not know the scope of the problem until 1977. See *infra* at para. 177. To some extent, this is of course true: Fitzgerald could not determine the precise scope of the problem until he obtained the missing records (or otherwise secured proper documentation). But the December 1972 memorandum leaves no doubt that Fitzgerald was aware of the problem then, even if he did not know its precise dimensions.

169. On May 10, 1973, Fitzgerald requested confirmation from station controllers that they were following the procedures set out in his December, 1972 memorandum. From the responses he received, Fitzgerald was satisfied that the procedures were being properly implemented.[342]

170. Several months later, during late 1973 and early 1974, Fitzgerald's office undertook an internal audit of barter transactions at RKO's New York television and radio stations. One of the purposes of the audit was "[t]o alert corporate management to the fact that while trade deals represent an area of great magnitude, they are treated by the stations as being unworthy of necessary controls since they have no effect on the bottom line . . . ." [343] An auditors' report was issued on or about May 13, 1974. The report stated that "[f]or each of the stations reviewed, serious deficiencies have been noted . . . ." [344] Specifically, the auditors found inadequate and inconsistent procedures, serious deficiencies in controls, an inability to reconcile obligations owing in barter transactions, only partial documentation for some transactions, and many other transactions for which there were no supporting records.[345]

171. The 1974 report demonstrated that, despite his efforts to correct the situation, Fitzgerald did not have adequate records to account for all of RKO's barter and trade transactions. This was not an academic matter. Only a few weeks before issuance of the auditors' report, Fitzgerald had certified to the Commission that RKO's 324 financial reports for fiscal year 1973 were accurate and complete. The auditors' report exposed that certification as unsupportable. However, RKO made no effort to correct the financial reports it had just filed.

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[342] Fitzgerald affidavit at 4-5.

[343] Special Report at 224, quoting from the auditors' report.

[344] *Id.*, n.119.

[345] *Id.* at 224.

172. Nonetheless, Fitzgerald apparently felt that the auditors' report confirmed the wisdom of his earlier accounting recommendation to Poor. After receipt of that report, Fitzgerald again suggested that RKO adopt the general ledger method of accounting for barters.[346] The heads of RKO's television and radio division continued to believe that the existing system, with better defined procedures, could provide adequate controls. Poor therefore decided that the memorandum method should be retained.[347] Poor did, however, authorize Fitzgerald to issue new procedures on barter transactions. These new procedures were issued on July 10, 1974, and made effective as of August 1, 1974. They essentially continued the previous procedures, although stations were asked to provide more documentation covering barter and trade transactions.[348] Fitzgerald states that, at the time, "[i]t was believed" that adherence to the new procedures would provide adequate control and accounting of RKO's trade and barter transactions.[349] Poor avers that he likewise believed the procedures "would result in better cooperation and performance at the station level." [350]

173. There is no evidence that RKO had any facts to know that these new procedures were indeed producing better results.[351] However, since the new procedures were

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[346] RKO Findings, Affidavit of Bruce Johnson at 2; *id.*, Affidavit of Robert Glaser at 2.

[347] Poor affidavit at 7.

[348] Special Report at 224.

[349] Fitzgerald affidavit at 5.

[350] Poor affidavit at 8.

[351] The Commission specifically asked RKO to submit affidavits and any other material to mitigate the findings of the Special Report. FCC 79-453 (July 20, 1979). RKO did not proffer any material which revealed the extent to which, if any, individual stations were providing more complete data after issuance of the new procedures in July 1974.

not made effective until August 1974, and since the auditors' report exposed the earlier procedures as ineffective, RKO knew that the records were incomplete for at least seven months of the 1974 fiscal year (December 1973 to July 1974). This meant that RKO did not know how much barter and trade consideration was involved in that fiscal year or what impact it had on RKO's revenues and expenses. Nevertheless, in April 1975, RKO submitted its 324 Forms for fiscal year 1974 and again certified that its financial reports were accurate and complete. As before, this simply was not true, and RKO knew it.

174. Meanwhile, on December 29, 1975, the Accounting Standards Division of the American Institute of Certified Public Accountants (AICPA) issued its "Statement of Position on Accounting Practices in the Broadcasting Industry" (SOP No. 75-5). The Statement recognized that there was inconsistency and lack of uniformity in the practices of accounting for barter revenues; it recommended that, henceforth, all barter transactions should be accounted for in the general ledger and financial statements.[352] In a letter dated February 23, 1976, the Accounting Standards Division of the AICPA notified its members that Statement No. 75-5 would stand as a position paper, not enforceable under the AICPA Code of Professional Ethics, but that it would serve as a guideline in this area with substantial authoritative support.[353]

175. There is no evidence that RKO made any change in its procedures during 1976 as a result of the new accounting statement.[354] Nor is there any evidence that RKO acquired information to show that the problem first identified in 1972 and confirmed in 1974 had been cor-

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[352] Special Report at 221.

[353] RKO Findings, Affidavit of Robert C. Kingston, Att. A.

[354] See Kingston affidavit at 2.

rected.[355] However, sometime in 1976 RKO undertook another internal audit of barter transactions at the New York stations.[356] The preliminary findings of the audit were made available in 1976 and revealed that many of the problems found in 1974 still existed.[357] In April 1976, RKO certified to the Commission in its 324 reports that the financial records for the 1975 fiscal year were complete and accurate. In light of preceding events, RKO had no basis for making those representations; and the 1976 audit findings showed them to be erroneous.[358]

176. By early May, 1976, the Special Review Committee had been created to conduct an investigation into possible illegal use of corporate funds. Its report later provided further confirmation of what had been evident to RKO all along. In fact, in the fall of 1976, Fitzgerald informed the Special Committee's special counsel that he was dissatisfied with the station managers' response to his request for cooperation in following the accounting procedures he had earlier promulgated.[359] At that time, Fitzgerald also stated his view that top management would have to exert additional pressure to ensure compliance, but that management instead continued to express confidence that the accounting procedures were ade-

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[355] As explained previously, the Commission requested RKO to make a proffer of evidence concerning matters covered in the Special Report. RKO did not submit any material to show that it knew by 1976 that the reporting problem had been corrected.

[356] Special Report at 225. See Fitzgerald affidavit, Att. E.

[357] Special Report at 225.

[358] The record does not specify the precise date on which RKO acquired the preliminary results of the 1976 audit. Even if they were received after RKO filed its 1975 financial reports in April 1976, it would not change the analysis here. Those audit results only confirmed what RKO knew—that its records were incomplete and that its financial statements were therefore incomplete.

[359] Special Report at 225.

quate and being implemented.[360] The Special Report went on to say that this "difference of approach" was based primarily on "management's desire to respect the autonomy of station managers and the inability of station controllers to obtain the necessary information and documentation from managers to satisfy Fitzgerald's procedures." [361]

177. In early 1977, Arthur Young & Company, accountants for the Special Review Committee, requested documentation from RKO of the receipt and disposition of barter consideration received by RKO stations during the years 1971-1975.[362] Fitzgerald recounted that, in light of this investigation, he asked all station controllers to review 324 reports to determine whether there had been any errors in the barter and trade estimates reported to the FCC.[363] In an affidavit filed with the Commission in August, 1979, Fitzgerald claimed that the controllers' responses to these requests disclosed to him "for the first time that there had been some failure to follow [his] instructions, leading to errors in . . . the estimated value of the goods and services received, omissions of some contracts, and other mistakes." [364]

178. Fitzgerald's bare assertion—that, prior to 1977 he had no "knowledge" of any errors in RKO's annual financial reports—simply cannot be reconciled with the facts. As early as 1972, Fitzgerald knew that barter transactions were inadequately accounted for by RKO. In his December 1972 memorandum to station controllers, Fitzgerald noted the "lack of adequate records" for bar-

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[360] *Id.*

[361] *Id.*

[362] RKO Findings at 25.

[363] Fitzgerald affidavit at 6; Special Report at 225.

[364] Fitzgerald affidavit at 6-7.

ters.[365] In May, 1974, the internal audit unequivocally confirmed that there were "serious deficiencies" in accounting controls for barter transactions, including fragmented and nonexistent records.[366] In 1976, the preliminary findings of another internal audit disclosed that "many of the problems found in 1974 still exist[ed]." [367] Moreover, in the fall of 1976, Fitzgerald himself expressed to Special Counsel his dissatisfaction with the response of station managers to requests for cooperation in following the accounting procedures he had promulgated.[368]

179. In light of this history, which Fitzgerald's affidavit does not refute, we simply cannot believe Fitzgerald's bald assertion now that "he had no knowledge" errors existed at the time the 324 reports were certified. Instead, the facts clearly compel a conclusion that, by 1972 and especially subsequent to the 1974 audit, Fitzgerald had to know that RKO's barter information was inaccurate. Therefore, when he subsequently certified RKO's Form 324 reports to the Commission, he falsely represented that the barter information contained therein was complete and accurate.

180. The nature and scope of the errors in RKO's financial reports were revealed by the Special Committee's investigation. RKO's files were found by Arthur Young accountants to be incomplete and unreliable. In addition, documentation was frewquently lacking or was incomplete as to receipt and disposition of goods or services. These findings were reflected in the Special Report, which made the following general observation:

> The common theme which Arthur Young noted was missing or poorly organized documentation, conflict-

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[365] Fitzgerald affidavit, Att. A.

[366] Special Report at 224.

[367] *Id.* at 225.

[368] *Id.*

> ing information provided by persons within RKO with whom barter arrangements were discussed, repeated discovery or disclosure to them of additional pertinent facts on a piecemeal basis, and inconsistent estimations, often subjective, of values and data combined with an atmosphere of vagueness and lack of specificity.[369]

The Special Report concluded that, in all, RKO had no records or incomplete records for 13 million dollars of what was at least 17 million dollars in barter consideration received in calendar years 1971-1975 [370]

181. In early 1977, RKO changed its method of accounting for barter transactions so as to include barter revenues and expenses in its general ledger and financial statements. RKO's Form 324 for the prior fiscal year (December 1, 1975 through November 30, 1976) was adjusted retroactively to reflect this change.[371] RKO proffered no evidence as to the factors that provoked this change.

(2) RKO's Defense

182. The preceding account makes it clear that RKO had no records or incomplete records for many barter transactions occurring throughout 1971-1975. The lack of adequate records necessarily caused inaccuracies in RLO's reporting of barter transactions in its annual financial reports filed with the Commission. RKO now admits that the errors occurred. The licensee claims, however, that the inaccuracies in its financial records "were not the result of intentional disregard of RKO's obligation to provide the Commission with accurate estimates of barter values." [372] In support, RKO relies solely

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[369] Special Report at 226.

[370] *Id.* at 225.

[371] RKO Reply Findings at 17.

[372] *Id.* at 18.

on the Fitzgerald affidavit wherein he claims he "had no knowledge that any errors existed at the time the reports were certified by [him] as being true and correct . . ." and that it was not until the Special Review Committee's investigation that he became aware of failure to follow his instructions. As explained above, however, Fitgerald's affidavit is not credible in light of the known and undisputed facts. Hence, RKO's reliance on that affidavit provides no support for its position.

183. RKO nonetheless observes that, to be disqualifying, licensee errors in financial reports must reveal a "wanton, gross and callous" disregard of a licensee's obligations, so as to be equivalent to an "affirmative and deliberate intent." [373] Because its conduct was neither gross negligence nor willful, RKO argues, its Form 324 errors have "no decisional significance so far as RKO's basic qualifications are concerned." [374]

184. RKO's reliance on this argument is misplaced here. The undisputed facts in the present case show that RKO had substantial information that it could not adequately document its barter and trade transactions. RKO ignored that information and certified to the Commission that its financial filings were complete and accurate. Under any reasonable standard, such conduct constitutes a deliberate effort to mislead the Commission.[375]

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[373] RKO Reply Findings at 21-22, citing *Golden Broadcasting Systems*, 68 FCC 2d 1099, 1101-02, 1105-06 (1978).

[374] RKO Findings at 69.

[375] RKO's reliance on *Swanco Broadcasting, Inc.*, 48 FCC 2d 753 (1973), *Emerald Broadcasting Co.*, 30 FCC 2d 879 (1971), and *Radio Eden*, 21 FCC 2d 464 (1970) is also misplaced. See RKO Findings at 67. In each of those cases, we found that misstatements to the Commission were the result of carelessness, rather than intentional misrepresentations. For example, in *Swanco* the Commission accepted the licensee's explanation that it was not aware the information it had supplied was inaccurate. Here, however, the facts demonstrate that RKO knew that information on its financial reports was untrue.

185. RKO further argues that its actions here should not have any adverse effect on RKO's qualifications because there was "no motive or intent to mislead." In this regard, RKO points to the absence of any evidence that barter consideration was used for illegal purposes and the likelihood that the barter transactions would have no material effect on net income.[376]

186. It should be emphasized that our conclusions here do not in any way hinge on a finding that barter consideration was used for improper purposes or on whether the errors affect RKO's profit figures.[377] At the outset, it is worth remembering, as the United States Supreme Court observed years ago,

> [t]he fact of concealment may be more significant than the facts concealed. The willingness to receive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to

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[376] RKO Findings at 68-69. Ironically, the arguments that RKO advances now represent the same attitude that Fitzgerald encountered from station managers when he unsuccessfully attempted to enforce adequate controls over barters: since the transactions may have little effect on station profit figures, the RKO stations simply viewed them as unworthy of attention, despite RKO's obligation to report accurately these transactions (and its concomitant duty to inform the Commission of figures that were incomplete or inaccurate).

[377] There are still many questions concerning the nature and use of the barter consideration. Although RKO did submit additional affidavits and other information concerning the barter transactions, and alhtough RKO claimed it found virtually no improper use of the barter considerations, we could not resolve those matters without further hearings. For example, we are not entirely sure how RKO defined "improper" purposes. Similarly, we have no way of knowing how the barter transactions affected RKO's profit levels since RKO still has not submitted corrected 324 Forms for 1972-75. Hence, we could not resolve this issue in RKO's favor without further hearings.

> say that the deception was unnecessary and served no purpose.[378]

Here the Commission issued a clear direction to its broadcast licensees in 1972 to fully and accurately report barter and trade transactions. Fitzgerald was aware of that obligation and made efforts (often in vain) to comply with it. RKO decided that its private organizational concerns took precedence over a clear Commission directive. RKO also deliberately misled the Commission into believing RKO had fully complied with that directive when in fact RKO knew otherwise. In this context, we cannot be reasonably assured that RKO would be honest and forthright with us in the future. It is not difficult to conceive of situations where other RKO interests may conflict with other Commission obligations. We do not want to take the risk—which appears substantial in the circumstances of this case—that the Commission's interests will take second place in that conflict.

187. We are especially concerned here since we do not necessarily accept RKO's contention that RKO officials had no motivation to conceal from the Commission the true facts of its financial situation. Plainly, if disclosed to the Commission, these persistent errors on RKO's annual financial reports would have revealed the licensee's continued inability—or unwillingness—to carry out procedures necessary for compliance with the Commission's reporting requirements. That kind of finding could have had serious consequences in a renewal or comparative proceeding. Consequently, RKO may have had sufficient motivation to willfully conceal these errors.[379] In any event, RKO's conduct with respect to these matters was simply unacceptable.

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[378] *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946).

[379] It should be noted, though, that we do not rely on RKO's motives as a basis for our decision here. Whatever RKO's motive, the facts of a knowing misrepresentation remain unaffected.

c. Lack of Control

188. The Special Report found that, although the memorandum method was an acceptable accounting technique, RKO's procedures on the handling and control of barters were not adequately implemented by the individual stations.[380] The Report further concluded that, because adequate, alternative control procedures were not substituted, there was "a serious lack of internal control over barters." [381] Fidelity charges that RKO's failure to maintain effective controls constituted "reckless indifference" to its responsibilities as a licensee. It notes that RKO had ample indications that stricter controls were necessary, yet took no action to change its accounting procedures until 1977, when it felt the pressure of the Special Committee's investigation.

189. In response, RKO points out that, prior to 1976, the memorandum method was a fully acceptable method of accounting for barters and, if properly implemented, would have provided adequate control. RKO further observes that its reliance on this accounting method was motivated by legitimate business reasons. Although it concedes memorandum accounting "was not always properly executed at the station level." [382] it maintains that RKO took reasonable steps to institute corrective action. Consequently, RKO argues that the evidence of its conduct negates any contention that RKO's senior officials were lax in requiring recordkeeping for barter transactions.[383]

190. The Commission has repeatedly emphasized that licensee control consists of more than promulgating policies: it also involves investigating their implementation

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[380] Special Report at 226.

[381] *Id.*

[382] RKO Findings at 67.

[383] RKO Reply Findings at 18.

and enforcing them.[384] The record shows that, on several occasions throughout 1972 and 1974, RKO did issue instructions to its stations regarding the proper recording of barter transactions. However, the facts also demonstrate that, when faced with incontrovertible evidence in 1974 that its present procedures could not, or would not, be adhered to by station managers, RKO waited almost three years before deciding to change its accounting system. As early as 1972, RKO's controller had recommended adoption of the general ledger method to provide better control over barters. RKO officials may have been justified in rejecting his initial recommendation; at that time, they had no reason to assume that the memorandum method could not be effectively carried out. They should have begun to suspect the problems when Fitzgerald felt forced to distribute a memorandum to station controllers in December 1972 to clarify some "confusion" and to urge stations to correct the inadequacies of their recordkeeping practices. After the 1974 audit, however, RKO was clearly on notice that its present system was not working and that station managers had actively resisted or ignored the procedures already issued by Fitzgerald.

191. To be sure, the 1974 procedures were more detailed and included more reporting requirements than previous procedures; but the new procedures, like the previous ones, continued to rely on individuals who, as Fitzgerald later explained to the Special Committee, felt that these matters simply were not worth their time. In these circumstances, and in light of the severity of the problem, RKO officials could not reasonably have believed that the mere issuance of another set of procedures from Fitzgerald would constitute a strong and effective corrective measure. We also observe that, despite the apparent magnitude of the problem, RKO did not further in-

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[384] See, e.g., *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 127 (1968).

vestigate the stations' compliance with its procedures until 1976, when another audit disclosed that the situation had not visibly improved.[385]

192. RKO argues that prior case law precludes the Commission from disqualifying it for its lack of control. However, none of the cases it cites presented facts as serious as those here.[386] In any event, we are not disqualifying RKO solely because of any lack of supervision in preparing its financial reports. It is the blatant misrepresentations described above, coupled with the lack of control, that we find totally unacceptable for a broadcast licensee. It is our cumulative assessment of those considerations, based on clear and convincing evidence, that forms the basis for our resolution of this issue against RKO.

d. Procedural Issues

193. Finally, we note RKO's contention that, if the Commission does not find RKO fully qualified on the basis of its responses to our Order of July 20, 1979, it

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[385] RKO's difficulties implementing proper accounting procedures are not the only examples of its lack of control. The ALJ in the WNAC-TV proceeding found that RKO violated the sponsorship identification provisions of 47 U.S.C. § 317 and 47 C.F.R. § 73.654. I.D. paras. 239-42, 381, 382. RKO produced 57 episodes of the "Della Reese" program that required sponsorship identification, and it failed to disclose sponsorship on 40 of them. It had an established policy and procedures for complying with the sponsorship provisions, and delegated responsibility for this to the executive producer of "Della Reese." His superiors in RKO management relied on him without adequately confirming that their instructions were being followed.

[386] See *Rand Broadcasting Co.*, 22 RR 2d 155 (1971); *Swanco Broadcasting, Inc.*, *Emerald Broadcasting Co.*, and *Radio Eden*, *supra*. The three latter cases do not involve questions of lack of control by licensees but concern whether the licensees' inaccurate submissions to the Commission constitute intentional misrepresentations. We have treated them above, under the misrepresentation issue. See note 375, *supra*.

must give RKO specific notice of issues and an opportunity to further develop the record in a hearing.

194. We reject this argument. As discussed earlier, the Commission often provides notice to applicants and licensees by designating particularized issues.[387] Plainly, however, this is not the only means through which licensees may be afforded adequate notice. Here it is evident that RKO has had ample notice of our concerns as they relate to its lack of control over barter transactions and its submission of inaccurate barter information. First of all, as noted by Fidelity, the matters in issue have been unmistakably framed by the adversarial pleadings filed in this proceeding. On September 13, 1977, Community filed a Motion to Deny RKO's Renewal Application based on the findings in the Special Report which had described in great detail RKO's barter policies and practices between 1972 and 1977. In its Motion, Community specifically argued that the Report's findings evidenced both "RKO's conscious disregard of responsible procedures for accounting for millions of dollars of barter transactions and its "reckless misrepresentations" in annual financial reports filed with the Commission.[388] In our subsequent Order of July 20, 1979, we gave clear notice that the Commission would be concerned with every aspect of the Special Report.[389] Consequently, RKO was fully aware of the particular aspects of its conduct we would consider and the legal implications of that conduct.[390] Indeed, there can be absolutely no question that RKO has fully and clearly perceived the issues raised by its handling of barter transactions. Thus, in its response to Community's September 13, 1977

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[387] See para. 147, *supra*. See, e.g., *Oak Knoll Broadcasting Corp.*, FCC 77-451 (June 28, 1977).

[388] See Community Motion to Deny Renewal at 6, 9.

[389] See para. 151, *supra*.

[390] See *Mansfield Journal Co.* v. *FCC*, *supra*, 180 F.2d at 36.

Motion, RKO argued that it had not engaged in any misrepresentations in its Form 324 reports.[391] Similarly, in its "Summary of RKO's Position on Questions for Oral Argument," filed July 9, 1979, RKO maintained that the Special Report provided no basis for any inference that there was "any intentional or deliberate inaccuracy in any Form 324 filed by RKO."[392] Finally, in its Proposed Findings and Conclusions filed after our Order of July 20, 1979, RKO fully addressed the misrepresentation and lack of control issues discussed above.[393] Consequently, not only did the Commission provide clear notice of the matters that would concern it; there is also no doubt that, throughout this proceeding RKO has understood precisely how its conduct might bear on its qualifications to remain a licensee.

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[391] Response of RKO General, Inc. at 9.

[392] Summary of RKO's Position on Questions for Oral Argument at 4.

[393] See RKO Findings at 67, 72-74 (lack of control over its accounting system); *id.* at 69 (knowing certification to the Commission of inaccurate Form 324 reports); RKO Reply Findings at 7-18 (lack of control); *id.* at 18-20 (knowing certification). It should be noted that in 1977 the Commission denied Community's request under the Freedom of Information Act, as amended, 5 U.S.C. § 552, to inspect RKO's confidential 324 Forms. That request was denied because the Commission concluded that "RKO has not placed its financial condition in issue" and Community had not shown "'reasonable necessity for petitioner's having the information [in the 324 Forms] . . .'" *Community Broadcasting of Boston, Inc.*, FCC 77-765 (November 11, 1977), at 2-3. We believe that ruling was correct because the confidential information in the 324 Forms would obviously not disclose the data that was missing from them or whether RKO had misused barter consideration. However, in the course of its opinion the Commission stated as follows: "[W]e cannot see how the report of the Special Review Committee has placed RKO's financial reports in issue before this Commission." *Id.: at at 2. Considered out of context, that statement could be read to mean that the Commission had no interest at all* in RKO's 324 Forms. That would not have been a reasonable reading, however, since the Commission's order did not in any way purport to dispose of Community's pending Motion to Deny RKO's Renewal Application, which concerned lack of control and misrepresentation involved with RKO's 324 Forms. Moreover, RKO had to have known the Commission's FOIA decision did not resolve the control and misrepresentation issues; RKO continued to file

195. We also reject RKO's contention that the Communications Act requires us to engage in further hearings before reaching a determination that RKO is not qualified. As explained earlier, the law is clear that, when the record is sufficiently complete and no material facts are disputed, an evidentiary hearing is not required.[394] In concluding that RKO's conduct warrants disqualification, we have relied on undisputed facts from the Special Report and RKO's proffered affidavits. RKO has been afforded a full opportunity to address the legal conclusions to be derived from those facts. Therefore, in these circumstances, all procedural requisites have been satisfied and no further proceedings are necessary.

5. *RKO's Lack of Candor*

a. Introduction

196. It is abundantly clear that RKO has exhibited a lack of candor in its dealings with the Commission in these proceedings. At numerous junctures RKO withheld information that it knew or should have known to be relevant and material to pending matters; and at other points RKO made misrepresentations and other statements designed to avoid Commission inquiry into matters RKO knew or should have known were relevant

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pleadings dealing with the issues raised in Community's pleadings. See Summary of RKO's Position on Questions for Oral Argument, July 9, 1979, at 3-4. To the extent there was any confusion in RKO's mind as to the Commission's interest in the financial filings issues, that was corrected by our Order of July 20, 1979, which gave RKO a full opportunity to proffer any evidence and make any argument it wished with respect to those matters.

[394] See paras. 154-161, *supra*.

and material to pending decisions. Specifically, in its January 21, 1976 Opposition to Community's Petition to Reopen, RKO misled the Commission as to the truth of allegations made by Community. In addition, RKO not only certified falsely to the Commission that its financial reports were complete and accurate; RKO also tried to mislead the Commission into accepting the truthfulness of those reports when Community later alleged that they contained inaccuracies. RKO's lack of candor was likewise demonstrated by its fialures to timely inform the Commission of the SEC investigation concerning misconduct by General Tire at a time when that very misconduct was being called into question before this Commission.

b. RKO's Opposition To Petition To Reopen

197. As previously noted, on December 10, 1975, Community filed with the Commission a Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearing. In its petition, Community stated that it had obtained evidence demonstrating that General Tire had engaged in a wide-ranging pattern of misconduct and illegal activities over a period of years. Included in its charges were allegations that General Tire was involved in "illegal, unethical and improper conduct in the United States of America and in foreign countries," that it had engaged in illegal bribery of foreign public officials, that it had established secret accounts to evade banking and tax codes of foreign countries, and that it had defrauded the stockholders of its own subsidiaries by misappropriating corporate funds. Community also accused General Tire and RKO of attempting "to conceal, mislead and deceive" the public as well as government agencies (including this Commission) by failing to disclose information in their possession or by publicly claiming ignorance of known facts.[395]

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[395] Petition to Reopen at 4, 5-6. Most of the information submitted by Community came from a lengthy report which contained

198. Community was quite specific in its allegations. It named the secret Chilean "611" account, spelled out its uses and stated how it was funded. It gave the history of General Tire's connection with the Liechtenstein corporation, Fructal. It cited specific payments made from the Fructal bank account to individuals in Chile and other countries and stated their purposes. It recited the entire Aerojet-Moroccan bailout scheme. It accused General Tire of defrauding INSA stockholders by illegally diverting INSA profits to Fructal without notification to the stockholders. It stated that officials at the highest level of General Tire had initiated, encouraged, endorsed and/or approved these improper and illegal activities.[396]

199. In addition to asserting substantive misconduct, Community also alleged that RKO had violated Section 1.514 of the Commission's rules by failing to disclose

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the results of an inquiry conducted at the direction of the (non-General Tire controlled) board of directors of INSA. The investigation was conducted by a Chilean lawyer, Miguel Otero Lathrop (hence, the name Otero Report). The investigation was initiated in order to focus on the INSA assets which had been illegally diverted from that company's stockholders.

[396] In an affidavit contained in the Petition to Reopen, a Community investigator, Scott Armstrong, stated that he interviewed Howard Swires regarding General Tire's operations in Chile. Swires was the Managing Director of INSA for General Tire during the 1960's Acocrding to Armstrong, Swires stated that the Otero Report was the key to understanding General Tire's involvement in Chile, that the Otero Report accurately portrayed what happened within INSA, and that "the Otero Report proved that there was a pattern of moral turpitude implicit within the policies with which the O'Neil's managed [General Tire]." Swires also described the history of the "611" accounts and their purposes, as well as the history of General Tire's involvement with Fructal. He cited specific occasions where money was paid to foreign officials to obtain favors. He stated that M. G. O'Neil had knowledge of the Fructal account in 1966 or 1967, and that M. G. O'Neil asked Swires to "teach the ropes", including use of the Fructal account, to O'Neil's cousin, Ralph O'Neil. *Id.*, Exhibit 3.

General Tire's secret interest in Fructal,[397] had violated Section 1.65 of the rules by failing to disclose that General Tire's corporate activities were being investigated and by failing to disclose the legal violations themselves,[398] and had exhibited a lack of candor by failing to disclose information in its possession relating to the documented fraud and corruption. Finally, Community accused RKO of concealing material information, from the SEC and its stockholders, thereby violating both the Securities and Exchange Act of 1934 and SEC rules,[399] and of misleading the public as to its knowledge and participation in Fructal.[400] Community's Petition to Reopen also attached three volumes of exhibits totalling 640 pages. Included in the exhibits were transcripts of interviews of General Tire personnel, affidavits signed by company executives and financial data concerning General Tire's dealings in Chile.

200. RKO obtained an extension of time within which to respond to Community's petition. RKO explained that it needed the additional time "to verify translated docu-

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[397] Section 1.514(a) of the Commission's rules states in pertinent part: "Each application shall include all information called for by the particular form on which the application is required to be filed." In this case, Community alleged that RKO had failed to include in its renewal application information concerning General Tire's interest in Fructal.

[398] Section 1.65 of the Commission's rules provides in pertinent part: "Whenever there has been a substantial change as to any . . . matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate."

[399] The sections of the Act alleged to have been violated were 15 U.S.C. §§ 78m(a) and 78j(b). The SEC rules allegedly broken were 17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.12a-1 and 240.13a-13. Petition to Reopen at 22.

[400] Petition to Reopen at 26.

ments" in Community's Petition and to consult with "persons who may have knowledge of the pertinent facts."[401] RKO filed its Opposition to Community's petition on January 21, 1976. In its Opposition, RKO asserted that Community had no basis for its allegations of misconduct. Specifically, RKO stated:

—that Community's charges were "essentially unsupported" and that "sensationalism and blatant exaggerations are rampant";[402]

—that "there is no factual or legal foundation for this pyramid of charges";[403]

—that "there was no competent support whatsoever" for Community's allegations regarding General Tire's maintenance of secret accounts and that "Community has entirely failed to furnish support for its wild-swinging charges that General Tire has made a number of foreign bribes and illegal political payments to foreign officials";[404]

—that "Community has not shown that General Tire has engaged in such conduct" involving violations of SEC and tax laws and that "the charges, as we show below, are groundless";[405]

—that Community has "not assert[ed] any improper political contributions by General Tire in the United States";[406]

—that, in general, "Community has wholly failed to support, much less show a substantial likelihood of proving, any of its broad-scale allegations that General Tire has engaged in fraud, bribes, illegal political payments or any violations of disclosure requirements."[407]

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[401] RKO Motion for Extension of Time at 2-3.

[402] RKO Opposition at 5.

[403] *Id.*

[404] *Id.* at 14, 17.

[405] *Id.* at 17.

[406] *Id.* at 5 n.*.

201. In short, RKO not only attacked Community's basis for making its charges; RKO also attempted to make the Commission believe that there was *in fact* no truth to the charges. As the unchallenged findings of the Special Report later made clear, however, Community's charges were not "wild-swinging" and "groundless"; virtually all of those charges were well founded and, most importantly, highly placed officials at General Tire were aware that most of them were true at the time RKO's Opposition was filed. Hence, RKO officials, too, must have been aware of those facts when RKO's Opposition was filed.[408]

202. Thus, RKO could not in truth state that "there is no factual or legal foundation for this pyramid of charges" concerning bribes and other improper pay-

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[407] *Id.* at 23.

[408] It must be remembered that RKO obtained an extension of time in order to consult with persons familiar with the information in Community's Petition: since Community's charges concerned General Tire's misconduct, RKO would have had to contact General Tire officials. Indeed, it is inconceivable that RKO could have responded to Community's Petition without consulting highly placed General Tire officials. Proof that RKO did consult General Tire is evidenced by documents concerning General Tire's dealings in Chile supplied by RKO as exhibits to its response. RKO Opposition, Exhs. A, B, C. These documents would not have been in RKO's possession unless it had consulted with General Tire concerning the matters at hand. Moreover, had RKO responded to the charges without checking with General Tire to see if they were true, RKO would have been guilty of misconduct; an applicant must take affirmative steps to ascertain the truth of the facts submitted by it to the Commission. *Golden Broadcasting Systems, Inc., supra,* 68 FCC 2d at 1101-1102, 1103-1104; *Publix Television Corp.,* 36 FCC 1215, 1219, 1221 (1964).

ments to foreign government officials.[409] The undisputed facts in the Special Report show that, at the time this general denial was made, officials of General Tire knew otherwise. The Special Report states that at least several executives of General Tire, including its President and Chief Executive Officer, M. G. O'Neil, and Vice-Presidents Tress E. Pittenger, J. W. Foss and James H. Miller, knew of the existence of Fructal and the uses to which it was being put at least since 1974.[410] The record also shows that O'Neil and Foss were aware of a $100,000 payment made to foreclose competition and facilitate a price increase in Chile.[411] In addition, O'Neil and Foss were both involved in payoffs made by company officials in Morocco during 1969 and 1970.[412] The Special Report also states that a payment allegedly made to government-connected individuals in Mexico was "cleared" in advance by General Tire headquarters in 1974.[413] In short, the facts show that, at the time RKO filed its Opposition, General Tire officials knew beyond a doubt that the company had engaged in improper payments abroad. Indeed, by this time the SEC had already initiated an inquiry with General Tire about some of the misconduct. Therefore, having consulted General Tire, RKO engaged in misrepresentations to this Commission when it stated that Community's charges had no factual or legal foundation.[414] It is noteworthy that, in refusing to be more forthcoming, RKO adopted a posture consistent with General Tire's SEC defense strategy. General Tire was resisting SEC document and other enforcement demands at least into February 1976. It would have undercut General Tire's SEC defense strategy for RKO at that time to have conceded any merit to Community's allegations or to give this Commission information of the sort which General Tire resisted in giving to the SEC. Therefore, RKO's pleadings with the Commission coincided with General Tire's efforts to conceal wrongdoing from the SEC.

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[409] RKO Opposition at 5.

[410] Special Report at 150, 152. O'Neil has stated in an affidavit that he first learned about Fructal sometime during the 1960's. Petition to Reopen, Exhibit 35 at 520.

[411] Special Report at 138. It is unclear as to precisely when O'Neil and Foss found out about the payment. At any rate, the Special Report discloses that information concerning various political payoffs in Chile reached General Tire's Akron headquarters sometimes in late 1973 or early 1974. *Id.* at 152.

[412] *Id.* at 112, 120-121.

[413] *Id.* at 163-164. The Report is unclear as to whether the payment was actually made after approval was given by General Tire headquarters.

203. Another example of RKO's lack of candor involves RKO's charge that "Community does not assert any improper political contributions by General Tire in the United States."[415] At the time this bald assertion was made, top executives of General Tire had known for years that such conduct had occurred and had, in fact, been active participants in the improper activities. Thus, the Special Report found that "[M. G.] O'Neil must bear primary responsibility for the initiation of the bonus/salary plan [in the 1960's] and the maintenance of the envelope and box funds [dating from at least the 1960's]."[416] And in an affidavit dated October 5, 1978, John B. Poor, RKO's Vice Chairman and former President, stated that in July 1968 he had learned of an improper program instituted by Cablecom (a subsidiary of RKO) in which employees were reimbursed for political contributions.[417] Thus, the general statement that

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[414] See RKO Opposition at 5; Special Report at 31-32; *supra* at paras. 200-201.

[415] RKO Opposition at 5 n.*.

[416] Special Report at 18.

[417] Fidelity's Proposed Findings, Affidavit of John Poor, Exhibit 4. Poor states that he took steps to terminate the program almost immediately after he learned of it.

Community had not alleged improper political contributions was technically correct; but the remark was gratuitous and obviously designed to mislead the Commission into believing that such contributions did not exist. We find this whole sequence quite disturbing. By making this remark in its Opposition, RKO wanted the Commission to attribute some significance to the "fact" that there had been no improper domestic political contributions; had the Commission accepted RKO's invitation, the Commission would have made a finding which RKO knew at the time to be false.

204. RKO tries to avoid the implication of its inaccurate statements by arguing that its responses were intended only as "a procedural attack on Community's failure to meet its threshold burden of making properly supported allegations of fact" [418] and that such an attack was proper since it is "fundamental to the adversarial process that an opposing party . . . require the proponent of an order to sustain its burden of proof . . ." [419] This argument is not persuasive. An FCC license proceeding cannot be equated with a private dispute between parties in a Federal or State court. The broadcast licensing process is carried out with the public interest foremost in mind. See 47 U.S.C. § 307, 309. Unlike private disputes in other forums, the public interest in receiving the best possible broadcast service overrides the interests of the individual parties. This basic difference is reflected in the obligations which we place on those who come before us. The courts and the Commission have made it clear in the past that the Commission must be able to expect total candor from its licensees and applicants at all times.[420] The limits on our staff and resources makes

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[418] RKO Reply Finding at 52.

[419] *Id.* at 57.

[420] E.g., *FCC* v. *WOKO, supra; Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 698 (1972). See 47 C.F.R. §§ 1.65, 1.514. Indeed, Congress was so concerned about an applicant's

this a necessity. And, aside from administrative convenience, we have a right to expect holders of a license for a public resource to be honest and forthright. Consequently, statements which are submitted to the Commission by broadcast applicants must be complete and accurate. The Commission should not be expected to "play" procedural games with its licensees in order to ascertain the whole truth. For this reason, adverse findings can be and have been made with respect to an applicant's qualifications if the applicant withholds important information from the Commission or otherwise tries to create impressions designed to mislead the Commission—even in pleadings containing statements that are "technically" correct but misleading as to the known state of facts.

205. The United States Court of Appeals for the District of Columbia recently agreed with this view, upholding the Commission's disqualification of an applicant from a comparative hearing. *WADECO, Inc.* v. *FCC*, Dkt. No. 78-913 (D.C. Cir. April 4, 1980). WADECO submitted to the Commission a bank letter that promised a loan if certain documentation satisfied the bank and "other participating institutions." The Commission inquired as to the other institutions that might participate. At the suggestion of WADECO's counsel, the bank deleted the reference instead. WADECO argued that this was not a misrepresentation because the bank had the option of relying on trust funds it administered instead of other institutions. The court did not question the "technical" accuracy of that assertion. The court nonetheless called WADECO's action "seriously lacking in candor" because WADECO's filing did not answer the Commission's concern as to whom the bank would rely on for additional funds.[421] Similarly, RKO may be right

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honesty that it expressly included false statements as a basis for license revocation. 47 U.S.C. § 312(a)(1).

[421] Slip Op. at 9. *Accord, Town & Country, Inc.*, 53 FCC 2d 1035, 1036-37 (Rev. Bd. 1975); *Fred Kaysbier*, 34 FCC 2d 788, 794-96

here that Community did not provide enough hard evidence to support all its allegations; but like WADECO with respect to the bank letter, RKO "skirted" the more important question of whether Community's allegations were in fact well founded—indeed, RKO went further than WADECO by making assertions to indicate to the Commission that the allegations were totally baseless.

c. *Nondisclosure of SEC Investigation*

206. RKO's lack of candor did not end with the filing of its Opposition in January 1976. The company continued to employ a policy of minimal disclosure even as it became clear that the true facts would be publicly exposed. In late February 1976, the SEC issued a formal order of investigation. The General Tire Board of Directors was sufficiently concerned to expand the Special Review Committee which had been appointed on January 23, 1976, to investigate the possible misconduct.[422] However, RKO did not at this time advise the Commission of the

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(Rev. Bd. 1970). The Commission does not distinguish between misleading responses to a pleading of another party and misrepresentations which are made in applications or other statements filed with the Commission. They are both treated with equal seriousness. See *Public Television Corp.*, *supra*, at 1219 (1964); *WNST Radio*, 70 FCC 2d 1036, 1043 (Rev. Bd. 1978). RKO correctly cites Section 1.229(d) of the Commission's Rules, which provides that "failure to file an opposition or a reply [to a motion to enlarge] will not necessarily be construed as an admission of any fact or argument contained in a pleading." 47 C.F.R. § 1.229(d). RKO Reply Findings at 57. However, RKO errs when it infers that this Section authorizes a party to make statements which are "technically" correct but designed to mislead the Commission. Nothing in Section 1.229(d) is inconsistent with an applicant's obligation to be honest and forthcoming.

[422] See Special Report at 31-32. The Special Review Committee originally consisted of only two outside directors of General Tire. The committee was expanded to include all five outside directors.

SEC's formal notice of investigation.[423] Despite the fact that the SEC was examining allegations similar to those in Community's Petition to Reopen, and despite the fact that one month previously RKO had submitted a pleading to the Commission denying the truth of those charges, RKO still felt no obligation to notify the Commission of the SEC action. On May 10, 1976, the SEC filed a formal complaint in a United States district court. At the same time, General Tire and M. G. O'Neil entered into a consent decree in order to settle the complaint. Only after this action was taken in a public forum did RKO notify us of the SEC proceedings. We received notice from RKO on May 14, 1976.

207. Not only does RKO's failure to make a timely disclosure of the SEC investigation provide an additional example of the lack of candor which has permeated RKO's dealings with the Commission. That failure of disclosure also constitutes a violation of Section 1.65 of the Commission's rules, which requires the reporting of information to the Commission that may be of decisional significance.

208. RKO maintains that an investigation by a governmental body does not constitute a substantial change of decisional significance which must be reported pursuant to Section 1.65 of the Commission's rules. In support of this assertion, RKO cites *Lake Erie Broadcasting Co.*, 33 FCC 2d 1009 (Rev. Bd. 1972).[424] RKO's analysis

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[423] It should be remembered that T. F. O'Neil was the Chairman of the Boards of Directors of both General Tire and RKO. In the absence of an affidavit or other proffer to the contrary, we can reasonably infer from the known facts that by January 23, 1976, T. F. O'Neil personally was aware of the serious and substantial nature of the SEC inquiry (which had been going on for nine months) and also was aware of the concealment evidenced by RKO's Opposition of January 21, 1976. He took no steps to set the record straight.

[424] RKO Reply Findings at 58.

of Section 1.65 and its reliance on *Lake Erie* are entirely misplaced. A review of the facts in *Lake Erie* exposes the shortcomings of RKO's arguments.

209. In *Lake Erie*, one party in a comparative broadcast hearing requested that an issue be designated against its competitor for failure to report to the Commission the fact that the Internal Revenue Service and the National Labor Relations Board were investigating complaints filed against the competitor. The Review Board refused to add an issue. In making its decision, the Board placed primary significance on the fact that the IRS and the NLRB had not lodged any official charges or undertaken any formal actions against the competitor:

> . . . we concur with the Broadcast Bureau that accusations by complainants, *as opposed to official charges by the responsible governmental agency*, do not require an immediate Rule 1.65 notification. The Board does not believe that inquiries or investigations by the IRS and the NLRB, *which may or may not lead to formal actions by those agencies*, are "pending actions" which must be reported by Lorain to maintain the accuracy and completeness of its application. Nor do we believe that these preliminary investigations by the IRS and the NLRB constitute a substantial change which may be of decisional significance in this proceeding. (Footnote and citations omitted; emphasis added.) 33 FCC 2d at 1011-1012.

For purposes of Section 1.65, then, the Board clearly distinguished between outside complaints and formal actions taken by public agencies. The Commission itself later accepted the reasoning of the Review Board and distinguished between outside complaints and formal agency actions for purposes of Section 1.65:

> Once a complaint ripens and becomes the subject of a formal proceeding, the outcome of which could reflect

adversely on the character of one of [the] applicant's principals and thus possibly affect the applicant's qualifications to be a licensee, an obligation arises under Section 1.65 of the Rules to make full disclosure. *Payne of Virginia, Inc.*, 66 FCC 2d 633, 643 (1977).

210. When it instituted a formal investigation against General Tire and M. G. O'Neil, the SEC took formal action which should have been reported under Section 1.65. At the SEC, as at other law enforcement agencies, institution of a formal investigation means that "there is a likelihood" of violation of applicable laws. The Commission itself, not just the staff, then authorizes the use of compulsory process for further inquiry.[425]

211. It should be noted that the key date for disclosure is when the party is notified of the formal proceeding against it. The party cannot delay disclosure pending the outcome of the proceeding, since by that time "the opportunity for the Commission to consider the effects . . . may be long past."[426] The need for timely disclosure is clearly illustrated in the present case. If the formal SEC investigation had dragged on beyond the date of FCC action on RKO's application, the Commission would not have known about the investigation or been in a position to condition any renewal on the outcome of the investigation and any resulting litigation. Therefore, the latest conceivable date on which RKO could have timely informed the Commission of the SEC

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[425] 17 C.F.R. § 202.5(a). This SEC rule provides:

> When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission which may then order a formal investigation or examination if it is deemed necessary.

[426] *Payne of Virginia, Inc., supra*, 66 FCC 2d at 642.

action was 30 days after RKO received notice of the formal investigation.

212. General Tire (and therefore RKO) received its notice in late February 1976. Yet it was not until May 14, 1976—two and one-half months later—that RKO finally informed the Commission. The intended purpose of Section 1.65 "to keep the Commission apprised of all substantial and decisionally significant changes"[427] was thereby frustrated. RKO's failure is particularly egregious in the context of this case, where (i) the Commission had previously designated RKO's character and candor as issues,[428] (ii) Community's petition to add issues relating to the subject matter of the SEC investigation was pending, (iii) top General Tire personnel (including T. F. O'Neil, at least by the time of the January 23, 1976 General Tire board meeting) knew that Community's concerns were justified, and (iv) the potentially disqualifying nature of what the SEC might have or had found was manifest. Under these circumstances it was not reasonable for RKO to decide that the existence of the probe was decisionally insignificant. Nor do we believe that "RKO at all pertinent times acted in accord with the Commission's reporting requirements."[429]

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[427] *Payne of Virginia, Inc., supra,* 66 FCC 2d at 643, n. 25.

[428] See *RKO General, Inc.,* 30 FCC 2d 138 (Rev. Bd. 1971).

[429] RKO Reply Findings at 60. RKO, in its Reply, appears to confuse the information required by the Commission to be disclosed in its Renewal Form 303 and that required to be disclosed under Section 1.65 of our Rules. RKO Reply at 58 n.*. Form 303 was revised in 1976 to require renewal applicants to inform the Commission of "adverse findings" or "final actions" concerning certain types of litigation; the revised form would not require reporting of the SEC investigation. See *Revision of FCC Form 303,* 61 FCC 2d 27 (1976). However, this in no way affects the independent requirement of Section 1.65 that applicants inform the Commission "of *all* facts, whether requested in Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors." *Southern Broad-*

d. Community's Petition Concerning RKO's Financial Reports

213. On April 7, 1977, Community filed a "Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules." Community requested that the Commission order RKO to file notice as to whether it had violated the Commission's rules regarding the reporting of trade and barter transactions, and, if so, promptly to furnish details of any such violations.[430] The petition was based on the following excerpt from General Tire's 1976 Annual Report to shareholders: "Such [barter and trade] transactions . . . were generally accounted for on a memoranda basis, although the records for such transactions are in a number of instances not now complete." [431] Noting the above language, plus the fact that RKO's accounting practices for barter and trade transactions were then under investigation by the Special Review Committee, Community suggested that RKO had not properly reported all of its barter and trade transactions to the Commission on its Form 324 reports. Community pointed out that if RKO had failed to report all of its barter and trade transactions, it was in violation of the Commission's rules and had an obligation to notify the Commission of that fact.[432]

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casting Co., 38 FCC 2d 461, 464 (Rev. Bd. 1972) *modified*, 41 FCC 2d 353 (Rev. Bd. 1973). See *Reporting of Changed Circumstances*, 3 RR 2d 1622, 1631 n. 3 (1964). As discussed above, under the circumstances of this case, the SEC investigation into charges of misconduct was clearly of such decisional significance as to require disclosure under Section 1.65. It is also noteworthy that our renewal form was not changed until several months *after* the SEC issued its formal notice of investigation. 59 FCC 2d 750 (1976). Prior to the change, reporting of the SEC investigation would have been required.

[430] Petition to Comply at 4.

[431] General Tire and Rubber Company, 1976 Annual Report, at 7, quoted in Petition to Comply at 2.

[432] Petition to Comply at 3.

214. On April 18, 1977, RKO filed its Opposition to Community's Petition. In its Opposition, RKO claimed that Community had not alleged there were any inaccuracies in RKO's Form 324 reports. Instead, Community had indulged in "sheer speculation" in contending that RKO had not fully and accurately reported its barter and trade transactions.[433] RKO further contended that it was immaterial whether the records of RKO's pre-1976 barter and trade transactions were now complete since Community had not impugned "the completeness of the information available to RKO at the time the Form 324's were filed, or . . . the accuracy of the financial information that RKO reported to the Commission."[434] The clear import of RKO's pleading was that, as far as RKO knew, its financial reports were both complete and accurate.

215. As the Special Report and affidavits filed with the Commission clearly show, RKO displayed a total lack of candor in its opposition to Community's allegations concerning the barter and trade transactions. By claiming that Community had indulged in "sheer speculation" here, RKO was plainly trying to make the Commission believe that, contrary to Community's allegations, all pre-1976 Form 324 reports were accurate and complete.[435] However, at the time, RKO officials knew and had known at least since 1972 that inaccuracies existed.[436] RKO further stated that the completeness of its pre-1976 barter and trade records was immaterial since Community had not impugned the completeness and accuracy of the information at the time the 324's were filed. Yet RKO officials knew, and had known since at least 1972, that these records were in disarray and had been in disarray for

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[433] Opposition to Petition to Comply at 2.

[434] *Id.* at 2-3.

[435] *Id.* at 2.

[436] Special Report at 224; *supra* at para. 168.

years.[437] Equally disturbing is the subsequent sequence of events. On May 1, 1977—two weeks after it filed its opposition—RKO received another audit report, this one showing that there was no documentation at all or only partial documentation to cover $13 million worth of barter and trade consideration.[438] Although it had just informed the Commission that there was no basis to Community's charges of incomplete records, RKO made no effort to correct the errors in its pleading.

216. As with its Opposition to Community's Petition to Reopen, RKO tries to characterize its Opposition to Community's Petition to Comply as merely a procedural attack on Community's failure to meet its burden, rather than a denial of the substantive charges.[439] But, as discussed previously, we cannot accept the legitimacy of that argument here.[440] Had there not been a Special Report, we might well have denied Community's Petition—even though RKO knew that Petition to be well founded.

217. Moreover, we cannot agree that RKO's Opposition was merely a straightforward effort to raise procedural arguments. As actually worded, the RKO Opposition was patently an effort to conceal relevant information from the Commission and to deceive the Commission, by indignant prose, tacit implications of innocence, and omissions of material facts, into believing (at least for a while longer) that RKO's 324 Forms accurately recorded barter and trade data. If RKO did not intend to deceive the Commission it could have simply said that there is some evidence of inaccuracies and that a full report would be filed as promptly as possible at the conclusion of the pending Special Review Committee study and after compilation of more accurate data.

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[437] See paras. 168-175, *supra*.

[438] Special Report at 225.

[439] RKO Reply Findings at 54-55.

[440] See para. 204, *supra*.

218. RKO's conduct in filing its Opposition is just one more example of the lack of candor it has exhibited throughout this proceeding. As explained earlier, RKO falsely certified financial reports to be complete and accurate when it knew otherwise.[441] It then compounded the deception in its response to Community's pleading. Rather than seize the opportunity to make the necessary corrections, RKO attempted to mislead the Commission into believing the inaccuracies did not exist.

e. Procedural Issues

219. Contrary to its assertions, RKO is not entitled to any further hearing on the issues decided in this part of the opinion. As previously discussed, RKO has already had ample opportunity to present all relevant information at its disposal. We do not think any more material facts of decisional significance would be disclosed by a hearing.[442] This is so because the facts recited above are, in all material respects, undisputed. In making this characterization we have—as the foregoing discussion clearly demonstrates—fully accounted for RKO's view of the significance of those undisputed facts. We simply cannot accept the view of RKO that, in the context of this case, it could use procedural devices to keep this Commission in the dark about important matters and allow the Commission to make decisions which RKO knew would be based on erroneous assumptions.

220. Likewise, RKO may not complain that it was deprived of its procedural rights by the Commission's failure to specifically designate an issue concerning RKO's lack of candor. The purpose of designating issues is to

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[441] See paras. 163-187, *supra*.

[442] "[A]n agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence [citations omitted]." *City of Lafayette, Louisiana* v. *Securities and Exchange Commission*, 454 F.2d 941, 953 (D.C. Cir. 1971), *affirmed sub nom. Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973).

put the licensee on notice of the issues it will be expected to meet during the proceeding. RKO had specific notice that its candor was being called into question as early as September 1977, when Community raised the issue in its Motion to Deny RKO's License Renewal.[443] RKO was aware of the issue. In its Response to Community's allegations, filed October 28, 1977, RKO fully addressed the issue of its candor.[444] Clearly RKO cannot now argue that it did not have actual notice that its candor was in issue.

221. Moreover, case law is clear that such an issue need not be separately designated.[445] As we said in *Grenco*, "[N]otice to a renewal applicant that he must . . . not conceal material information is superfluous . . . . [N]o unfairness results in holding a renewal applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications, when a principal testifies falsely at the hearing."[446] The same principle applies to pleadings filed with the Commission. The Commission has a right to expect truth and candor from its licensees.

6. Consideration of Mitigating Factors

222. Even if RKO and General Tire are guilty of misconduct, RKO urges that renewal is mandated for three

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[443] Motion to Deny Renewal at 22-25. RKO received further actual notice that its candor was at issue in the Reply by Community to Response of RKO General, Inc., December 16, 1977, at 2-4 and in Fidelity's Findings at 34-43.

[444] Response of RKO General, Inc. at 14-17. See also RKO Reply Findings at 51-61.

[445] *E.g. Grenco, Inc.*, 39 FCC 2d 732 (1973). See also *Rocket Radio, Inc.*, 70 FCC 2d 413 (Rev. Bd.) *recon. granted in part and denied in part*, 70 FCC 2d 495 (Rev. Bd. 1977). "[A]ll those who seek licenses from the Commission are expected to submit truthful representations to the Commission which can be relied upon. . . . [T]ruth and candor are always in issue . . ." 70 FCC 2d at 418 n. 19.

[446] 39 FCC 2d at 736.

basic reasons. First, it contends that its past programming record is more than sufficient to offset any negative inferences which might be drawn from the record. Second, RKO suggests that its remedial steps demonstrate that it is unlikely any of the documented misconduct will recur and thus RKO can be entrusted to operate WNAC-TV in the public interest in the future. Third, it argues that denial would be inconsistent with Commission precedent. We disagree on all counts.

a. Past Broadcast History

223. When considering whether to revoke a license or deny a renewal application, the Commission normally assesses any evidence in mitigation of any wrongdoing committed by the licensee. One such area of mitigation is an applicant's past broadcast record. In this case RKO has repeatedly urged that its past broadcast record is so exceptional that it overcomes any negative inferences to be drawn from any established misconduct. We disagree. We do not believe that RKO's broadcast program record is sufficiently meritorious to overcome the negative impact of the misconduct. This point requires some elaboration.

224. The record contains extensive evidence concerning WNAC-TV's operation during the license period as well as evidence concerning all aspects of RKO's broadcast operations.[447] RKO has also made a proffer of proof in this respect in its August 27, 1979 proposed findings of fact.[448] We have carefully reviewed the record evidence and credited RKO with the additional information included in its latest proffer of evidence.

225. There are points to be made in RKO's favor. The proffered evidence, which relies heavily on the findings in

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[447] See I.D. paras. 388-394. RKO also submitted evidence on its broadcast operations generally in the KHJ-TV proceeding. The Initial Decision here referred to that evidence, I.D. para. 391, and we take official notice of it.

[448] RKO Proposed Findings, App. F.

the WNAC-TV and KHJ-TV proceedings, was offered to demonstrate that RKO has been an FM broadcaster since the earliest days and was willing to make financial sacrifices in the embryonic stages of FM development; it has pioneered operations in the field of subscription television, again at great cost; it originated the first FM network broadcast and the first FM daily program seven days a week; it pioneered establishment of Hollywood film libraries for television against strong opposition from motion picture producers; it was a leader in stereo broadcasting; it engineered a technical change of filters for light projection sources widely adopted by the industry and numerous other technical developments as outlined by the Presiding Officer in his Initial Decision in the Los Angeles proceeding; it has made significant contributions to educational broadcasting; and it has contributed to the development of new program sources for television.[449]

226. While RKO's performance has a positive side, it is not sufficient to mitigate the misconduct shown here. To begin with, WNAC-TV's record is a mixed one. While the station did undertake some unusual efforts to serve the community, WNAC-TV's performance was in many respects substantially inferior to that of other stations in the Boston market.[450] WNAC-TV's three composite weeks during the 1966-69 license period show that it carried a range of 85.4%-87.0% entertainment and sports, 4.0%-5.4% news, and 8.6%-10.4% in all other categories. Local programming ranged from 8.0% to 11.4%, with a range

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[449] *Id.* See, I.D. paras. 9, 11, 380, 391; *RKO General, Inc. (KHJ-TV), supra,* 44 FCC 2d at 131; *RKO General, Inc. (KHJ-TV I.D.), supra,* 44 FCC 2d at 154, 155 and 218.

[450] I.D. para. 139. RKO's argument that comparison of its broadcast record with that of other stations is unfair and inappropriate is clearly without merit in view of the explicit comparisons made by the Commission in *RKO General, Inc. (KHJ-TV),* 44 FCC 2d 123, 130 n. 22, and *Moline Television Corp. (WQAD-TV),* 31 FCC 2d 263 (1971).

of 0.07% to 0.7% during the 6:00-11:00 p.m. period.[451] An analysis of the 1968 composite week of WBZ-TV, also a network affiliate in Boston, shows 79.6% entertainment and sports, 12.3% news, and 8.1% in all other categories. WBC-TV had 16.5% local programming, (3.5%, 6:00-11:00 p.m.).[452] A comparison of WNAC-TV's programming during a 36 week sample with that of WBZ-TV and WHDH-TV shows that WNAC-TV used far more feature films and recorded material; and it ranked third in terms of local programming;[453] that it also ranked third for both local and network news; and that it did not editorialize.[454] The record additionally establishes that WNAC-TV regularly preempted public affairs and instructional programs with movies and other entertainment programs.[455] Moreover, a substantial portion of the preempted shows were not subsequently broadcast.[456] While the Judge considered comparison of the programming of ABC affiliates in the ten largest television markets meaningless, he noted that WNAC-TV devoted a lesser percentage of time to news and local programs than the other nine stations, although it did rank higher in public affairs programming.[457]

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[451] I.D. para. 73.

[452] I.D. para. 140. WHDH-TV was the third network affiliate in Boston at the time in question. The Judge diminished the importance of the analysis of WHDH-TV's programming, since it was operating during this period with knowledge that its existence as a licensee was in jeopardy. I.D. para. 139. While this is true, consideration must also be given to the fact that the Commission earlier concluded in *WHDH, Inc.*, 16 FCC 2d 1, *modified*, 17 FCC 2d 856 (1969), *affirmed sub nom. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 923, (1971), that the station's record of 72.4% entertainment, 5.5% news, and 22.1% in all other categories, with 22.05% local programming (10.7%, 6:00-11:00 p.m.), was within the bounds of *average* performance. *WHDH, Inc.*, 16 FCC 2d at 10.

[453] As the Judge noted, the local programming of WHDH-TV was substantially increased by its carriage of baseball games and bowling programs. I.D. para. 139.

[454] I.D. paras. 139, 394.

[455] Comm. Exs. 197-200.

[456] "Issues and Answers" was not shown at all 67 times during the license period and it was carried on a delayed basis (ranging from the same day to as much as a week) 74 times. "Scope,"

227. In summary, while WNAC-TV is entitled to credit for many aspects of its operations, the evidence must be evaluated in light of the station's mediocre to poor record with respect to news, public affairs, and local programming, and particularly its miniscule showing of local programming in prime time. As the Commission has noted, the basis for allocation of spectrum space to broadcasting is the contribution it can make to an informed electorate; the use of a television station as a "network spigot or mere purveyor of nonlocal programming" undermines that basic allocation scheme.[458] Under these circumstances, the Commission is persuaded: (i) that the favorable aspects of WNAC-TV's record are offset by its deficiencies with respect to news, public affairs, and local programming; (ii) that WNAC-TV has not made such a showing of attention and devotion to local needs to establish an unusually good record; and (iii) that WNAC-TV's service must be deemed to be within the bounds of average performance of all licensees.

228. Conclusions reached by the Presiding Officer, the Commission, and the court in the KHJ-TV proceeding

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a public affairs program, "Discovery," an instructional-educational program, and "Directions," a religious program, were rarely carried at their regularly scheduled network times. WNAC-TV did not broadcast these latter programs at all 138 times, and it carried them on a delayed basis (often at 1:00 a.m. or 8:00 a.m.) 198 times. I.D. paras. 143; Comm. Exs. 196-200.

[457] I.D. para. 141. WNAC-TV was the ABC affiliate in Boston from 1961-1975, but is now affiliated with the CBS network.

[458] *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process,* Docket No. 19154, 27 FCC 2d 580, 581 (1971).

further highlight the shortcomings in RKO's operations. The Presiding Officer there noted that RKO should be credited for its contributions in the development to pay television; in establishing film libraries; in keeping the station operational during financially difficult times; in meeting its predicted program proposals; and in presenting programs in the public interest.[459] At the same time the ALJ found serious deficiencies in KHJ-TV's record:

> [I]t is no recommendation to KHJ-TV's qualifications that it has so supinely bowed out of competition with network news. Contrary to what appears to be the station's rationale, network news is not the alpha and omega of television news programming. One would think that a station so richly endowed with broadcasting resources, experience, and financial backing would, if the public interest were in fact the touchstone of its operation, welcome the challenge of competing in a field where it apparently believes there is so much excellence. Its policy of non-interference in serving audience needs, when it believes some other station is serving those needs, viewed in connection with KHJ-TV's record here, suggests that the policy is merely a euphemism for one that dictates dedication of a majority of the station's air time to service of the young, the congenitally gullible and those not very bright. The policy then, in fact, directs the station's programming to an already well served group, and because it does and because it is disingenous, it can only be held to fault licensee qualifications. The policy of not presenting editorials runs squarely athwart Commission policy. The Commission assesses demerits for failure to editorialize, see *WHDH, Inc., et al.*, 16 FCC 2d 1, at 10 and 12-13, 15 RR 2d 411 at 425 and 427; Memorandum Opinion and Order

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[459] *RKO General, Inc. (KHJ-TV I.D.), supra*, 44 FCC 2d at 218 (Conclusions, para. 2).

> denying rehearing, etc., 17 FCC 2d 856, at 859, 16 RR 2d 185 at 190.[460]

He also noted that

> an inordinate amount of time was devoted by KHJ-TV to a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, hour after hour, day after day, week after week, month after month, year after year, *ad infinitum ad nauseam.* To hold, and such is the holding, that this kind of air-time utilization does not serve the public interest is an exercise of restrained understatement. Such air use by a station serves well the interests of the station and the advertiser. As the record amply demonstrates, it barely touches service to the public, much less service in the public interest.[461]

In the Presiding Officer's opinion:

> The trouble with General Tire's stewardship of KHJ-TV is that, in the overall, its on-the-air operation miserably failed to serve the public interest. This ultimate fact the record also establishes unmistakably. It could well be said of General Tire at KHJ-TV that it "could" but "wouldn't" or "didn't." Why it chose to thus operate the station is of course a question that is locked in the breast of General Tire's management. A good guess would be that with a myopic eye on the dollar it decided "formula broadcasting" would "get by" because the station would never be called to account. [Footnote omitted]. If that was the rationale behind the policy that has brought the station to the brink of loss of license, about the kindest thing

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[460] *Id.* (I.D. Conclusions, para. 5).

[461] *Id.* (I.D. Conclusions, para. 9).

> that can be said of it is that it evinced considerable naivete concerning the stability of regulatory policy.[462]

229. The Commission did not adopt all the conclusions of the Presiding Officer. However, the Commission did recognize that KHJ-TV's performance was something far less than outstanding. Under the circumstances the Commission was simply "persuaded that there are sufficient good points to offset the less favorable aspects of KHJ-TV's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus warranting neither a preference nor a demerit." [463]

230. The Court of Appeals affirmed the decision of the Commission:

> On an absolute basis, it might be difficult for all of us, if we were regulators, to characterize KHJ's past performance as "superior," entitling it to "a plus of major significance," but as judges we are agreed that we cannot, on the record as a whole, say that the Commission's decision that programming performance was "average" is bereft of the support of substantial evidence.[464]

In concluding, the court stated as follows:

> On the whole it is fair to say that the Commission found that the ultimate effect of its analysis of the record was that Fidelity and RKO were essentially equally poor contenders—or, at the best, both were minimally acceptable applicants. While the agency was under no obligation to give the license to either competitor, we cannot say that it committed legal error when, in its attitude as of the times pertinent

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[462] *Id.* (I.D. Conclusions, para. 23).

[463] 44 FCC 2d at 133.

[464] *Fidelity Television, Inc.* v. *FCC, supra*, 515 F.2d at 700.

in this case, it took the view that "minimal service is to be preferred to no service at all." *Compare* Broadcast License Renewal Act, H. Rep. No. 93-961, 93d Cong., 2d Sess. 17 (1974).[465]

231. In sum, the mixed program performance precludes any finding that RKO's past broadcast experience outweighs the adverse findings made earlier. In its latest proposed findings of fact and conclusions of law, however, RKO argues that it is entitled to more hearings on mitigation before the Commission makes any adverse judgment.[466] We disagree.

232. Initially, it should be recalled that the Commissioner's Order of July 20, 1979 expressly directed RKO to make a proffer of any and all evidence it wished to introduce to overcome any adverse findings based on the Special Report. RKO did not request an extension of time to enable it to gather additional material, although extensions were sought and granted for other purposes. Nor does RKO suggest what evidence it would proffer even if we were to grant it additional hearings. Having failed to satisfy that burden, RKO has no standing now to request further hearings to explore unspecified evidence.[467] This conclusion is especially compelling in

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[465] *Id.* at 702. Because Multi-State was initially disqualified in the New York proceeding, we did not make an assessment of RKO's broadcast record at WOR-TV. See note 81, *supra*. However, RKO was advised that the New York proceeding would be conditioned on the outcome of the instant case and was given an opportunity in the July 20 order to introduce evidence concerning its New York operation. RKO did not take advantage of that opportunity and, as explained below, we do not think RKO is entitled to another opportunity. In any event, since we do not find RKO qualified because of the misconduct documented here, we do not think the broadcast record at one station—no matter how meritorious—would overcome the adverse findings against RKO.

[466] RKO Findings, App. A.

[467] E.g., *CAB* v. *State Airlines*, *supra*, 338 U.S. at 579-81 (1950).

light of two additional facts; first, RKO knew that evidence of its past broadcast record could be used to mitigate any misconduct and, accordingly, RKO did introduce considerable evidence concerning its *entire* broadcast record in earlier proceedings; and, second, RKO has had the Special Report since 1977, it has known all along that additional evidence of its broadcast record could be considered in mitigation of any adverse Commission findings based on that Special Report, and, therefore, it has had more than ample opportunity to develop specific proffers of any additional evidence it wanted to introduce on its past broadcast record. Having failed to act in a timely manner after being afforded notice and opportunity, RKO is not entitled to prolong this proceeding further under the guise of offering additional evidence of its past programming.

b. Remedial Actions

233. Another factor considered in possible mitigation concerns any corrective acts undertaken by an errant licensee as an indication that future misconduct will not occur. Both General Tire and RKO have entered into a consent decree which prohibits reciprocal trade practices until 1980. General Tire and RKO also have taken remedial steps with respect to the matters covered by the Special Report. Prior to the entry of the final judgment of permanent injunction, General Tire had initiated steps to prevent recurrence of any misconduct. This was followed by implementation of policy statements on the need for adherence. After release of the Special Report, General Tire also adopted all the recommendations set forth in that document and implemented additional measures over the months that followed. RKO has also adopted the practice of recording barters and trades in the company's general ledger and financial statements and has established audit committees to check the adequacy of accounting controls.

234. To be sure, General Tire and RKO's recent remedial actions are worthy of some notice. However, it must be emphasized that these actions were initiated only after the Department of Justice and the SEC had begun to proceed against General Tire in a public forum.[468] Under traditional Commission precedent, promises of future compliance made after apprehension have not been accorded much weight.[469]

235. Equally disquieting is General Tire's unwillingness to remove top management officials involved in the wrongdoing. For instance, Tress E. Pittenger is still a General Tire Vice President and a Director even though he participated in and approved of the domestic political contribution plans and knew of the "black book" documenting Fructal's secret financial dealings.[470] The General Tire decision to retain M. G. O'Neil as President of General Tire is also pertinent. Normally, the Commission would not second guess a corporation's selection of management personnel. However, in this case the Special Report charges M. G. O'Neil with being responsible for much of General Tire's misconduct.[471] Yet, M. G. O'Neil is being retained in the "best interests of the company." While this may be in the best interest of the company, General Tire's record of wrongdoing shows it may not be best for the public interest. This is especially disconcerting in view of the fact that it was certain General Tire officials' and employees' notion of what comprised the

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[468] Special Report at 30-32.

[469] See, e.g., *Trustees of the University of Pennsylvania*, 69 FCC 2d 394, 1430 (1978), *reconsideration denied*, 71 FCC 2d 416 (1979); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966); *W.W.I.Z. Inc.*, 37 FCC 655, 656 (1964), *affirmed sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[470] Special Report at 31, 32.

[471] *Id.* at 18.

"best interest" of the company which led to much of the misconduct detailed in the Special Report. In the final analysis the Commission is charged under the Communications Act with serving the public interest, not the private interest of a company. Under these circumstances, the willingness of the company to retain M. G. O'Neil as the chief executive officer of the parent corporation, the 100 percent owner of RKO, further supports the conclusion that the remedial measures taken are insufficient to justify a grant of RKO's license renewal application for Station WNAC-TV.

c. Consistency with Past Decisions

236. RKO cites several cases in support of its contention that past precedent requires renewal here. Although the cases have some superficial similarities with the present situation, significant differences exist which make those cases inapposite. The first case is *Westinghouse Broadcasting Co., Inc., supra.* In that case employees of the Apparatus Products subsidiary division of the Westinghouse Corporation pleaded guilty or *nolo contendere* to indictments charging criminal conspiracy to fix prices, rig bids and divide markets for electrical equipment valued at $1,750,000,000 annually. Some of those involved served jail terms. The highest placed individual sentenced was at the divisional vice-president level, three organizational tiers below the office of the president of the parent corporation. No one in top management of the parent corporation and no one from the broadcast subsidiaries was aware of or participated in the wrongdoing. The Commission concluded that renewal of the license held by the Westinghouse broadcast subsidiaries should be granted. The Commission was singularly impressed by (i) a most convincing showing of excellent service of long duration in the public interest, (ii) Westinghouse's adoption of an intensive new compliance program, and (iii) the fact that no one associated with the broadcast subsidiary had any responsibilities for or was in any way involved in the errant subsidiary.

237. *Westinghouse* is thus quite different from the instant situation. Although the money amounts in *Westinghouse* were certainly greater and there were indeed criminal convictions, no one from top management in *Westinghouse* engaged in any of the wrongdoing. In contrast, the President of General Tire, M. G. O'Neil, was directly involved in this misconduct. Moreover, the chief executive officer of the broadcast subsidiary, T. F. O'Neil, had significant responsibilities in the operation of the parent company. We also note these other distinctions: unlike Westinghouse, RKO does not have an outstanding broadcast record; some of the misconduct involved the use of broadcast facilities (reciprocal trade practices and false annual financial reports); and *Westinghouse* did not involve lack of candor or misrepresentations to the Commission.

238. A second case heavily relied upon by RKO is *General Electric Company, supra.* General Electric was involved in substantially the same misconduct as Westinghouse. Under its organizational scheme, there were no separate subsidiaries. Instead, General Electric was divided into Product Groups which were further subdivided into divisions, departments and units. The Product Group involved in the antitrust misconduct was separate from the Consumer Products Group which encompassed the Radio and Television Division. The highest official involved in the wrongdoing was a divisional vice-president, two organizational levels below that of the president and chairman of the board of the company. Despite the enormous monies involved in the wrongdoing ($1,750,000,000 annually) the Commission granted renewal of the licenses to General Electric. In that case, the Commission was persuaded by the absence of any involvement by top management or any one associated with the Consumer Products Group in the wrongdoing; the General Electric proposal to assure greater supervision of the broadcast operations by the top management of the company; and the

length and outstanding quality of General Electric's past program record. Again, *General Electric* is significantly different from the instant case: RKO has no comparable outstanding past broadcast record; some of the misconduct here involved the use of broadcast facilities; and *General Electric* did not involve lack of candor or misrepresentations to the Commission.

239. The next case relied upon by RKO is *TelePrompTer Cable Systems, Inc.*, 40 FCC 2d 1027 (1973). In that case, the president of the parent corporation and the corporation itself were convicted of criminal bribery for paying local officials to induce them to award TelePrompTer a cable television franchise. Notwithstanding this conduct, the Commission granted a license for a Cable Television Relay Service (CARS) to a TelePrompTer subsidiary. In so doing, the Commission relied on the immediate removal of the miscreant from the corporation and the installation of a new board of directors. A compliance program was thereupon implemented by an entirely new management. Here, General Tire is still the same company as it was when the violations took place; the same top officers involved in the misconduct continue to run the company; and the misdeeds of TelePrompTer do not nearly approach the scope or severity of those evident here.

240. RKO also depends on *Coaxial Communications, Inc.*, 61 FCC 2d 81 (1976). In that case Loews Corporation (Loews) applied for Commission approval for the transfer of five CARS stations and a television translator station. By way of background, Loews Corporation was the parent corporation of Loews' Theatres, Inc. This subsidiary in turn controlled the Lorillard Division, a corporate operation engaged in the production and sale of tobacco products. As a result of Loews' participation in the SEC's voluntary disclosure program, information was presented to this Commission that senior employees of the Lorillard Division had made or knew of questionable payments of about $1.5 million in connection with

certain foreign sales of tobacco products. Additionally, senior executives of the parent corporation made a total of $48,000 in improper domestic political contributions over a three year period. Nonetheless, the transfer of control was granted without resort to hearing to determine the effect of these activities on the qualifications of the applicant to be a licensee. The Commission was inclined to follow this path because of, *inter alia*, the applicant's voluntary disclosure of these activities to the Commission and the SEC and the remedial steps taken to prevent recurrence.

241. That case also differs from the present proceeding in a number of significant ways. The activities in *Coaxial* were exclusively non-broadcast related, and the range of misconduct in *Coaxial* was much more limited than here. It is equally significant that, unlike Coaxial, RKO did not make any disclosures of misconduct to the FCC until forced to do so by other parties or agencies. All of this is of particular significance here, since the Commission relies heavily on the willingness of its licensees to be forthcoming in disclosing information. Finally, a clear distinction exists between the respective risks to the public. Loews, as the licensee of five CARS stations and a television translator station, has much less potential impact on the public than does the licensee of a broadcast station, such as WNAC-TV.

242. One last case relied upon by RKO is *Cowles Florida Broadcasting Inc., supra.* In that case Cowles Communications Inc. (CCI), the parent corporation of Cowles Florida, and five other subsidiaries of CCI were involved in fraudulent practices concerning the sale of magazine subscriptions to "Look" magazine, formerly published by CCI. It was learned that, to bolster sales, the subsidiaries engaged in improper sales and collection practices concerning such subscriptions. CCI twice took in-house steps to curtail the improprieties; and the Federal Trade Commission, Department of Justice, and Post

Office Department all conducted their own investigations. Ultimately, the five subsidiaries pleaded *nolo contendere* to 50 counts of mail fraud and paid $50,000 in fines. CCI and the five subsidiaries also entered into a civil consent decree enjoining them from engaging in future fraudulent practices. Notwithstanding the fraudulent misconduct of the subsidiaries and the knowledge of the parent corporations' top management, the Commission granted the renewal application of the broadcast subsidiary. The Commission concluded that there was an insufficient nexus between the non-broadcast related misconduct of the five subsidiaries and that there was no involvement of the broadcast facilities in any of the wrongdoing. Based on the above facts, the Commission concluded that *Cowles Florida* would be able to continue to operate Station WESH-TV in the public interest.

243. The precedential value of *Cowles Florida* has been greatly diminished by the U.S. Court of Appeals. Expressing its dissatisfaction with the Commission's handling of the mail fraud issues, the court remanded the proceeding with specific instructions to consider the interrelationship of principal officers common to both Cowles Florida and the five subsidiaries and, if appropriate, the "relevance of wrongdoing by a related corporation sharing principal officers with the licensee."[472] Thus, it is premature to place reliance on the Commission's holding in *Cowles Florida*. In any event, the limited scope of misconduct in *Cowles Florida* pales in comparison to the widespread record of wrongdoing here; moreover, *Cowles Florida* did not involve broadcast misconduct or any indication of a lack of candor or misrepresentations to the Commission.

244. Aside from reference to past reported decisions of the Commission, RKO insists that the ruling in *Melody*

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[472] 598 F.2d at 52.

Music v. *FCC*[473] requires the Commission to find it qualified to be the licensee of Station WNAC-TV. RKO argues that the Commission has already approved or allegedly intends to approve broadcast applications of parties that have engaged in misconduct similar to that found in the instant case. This argument has no basis whatsoever. To begin with, the burden is on RKO to present specific facts showing that other licensees were engaging in similar practices yet were treated differently. This RKO has totally failed to do. Accordingly, we are unable to give any credence to RKO's blanket attack. Second, we are faced here with a record of wrongdoing unique in Commission annals. We are not aware of any case presenting similar facts.

245. If and when a similar case is presented to us, we will certainly dispose of it in a manner consistent with today's ruling or rationally explain why different treatment is appropriate. On this point, attention should be directed to our decision in *Taft Broadcasting Corp.*,[474] a case which RKO alleges is similar to its situation. That case involved Westinghouse Broadcasting Company, Inc. and its parent corporation, Westinghouse Electric Corporation (WEC). WEC is divided into functional units, which are further divided into districts. On two separate occasions, officers of the Middle East District of WEC's Power Systems unit made payments to Egyptian officials. The first of these was for $250,000 and enabled WEC to obtain a contract to construct an electric generating plant in Cairo, Egypt. Another $73,000 was paid to facilitate the award of a contract to supply spare parts at other WEC-constructed Cairo electrical generating

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[473] *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965). This case forbids the Commission to treat similarly situated parties differently unless it explains the basis of its differing treatment with reference to the purposes of the Communications Act.

[474] *Taft Broadcasting Corporation*, FCC 80-48 (February 4, 1980).

plants. Neither payment was authorized by WEC corporate management and no WEC directors or persons in top management knew of the payments. However, since the two products obtained through the improper payments were being financed with the assistance of the United States government, WEC was required to disclose any kickbacks or payments made. Not knowing of the payments, the WEC officials responsible for completing the necessary applications for federal funds certified that WEC had made no payments other than to its named sales representatives. In light of these incorrect statements, WEC was charged with violating 18 U.S.C. § 1001 for making false statements to federal government agencies. WEC pleaded guilty to the criminal charges and paid a $300,000 fine.

246. Numerous factors make this case distinguishable from the instant proceeding. The payments in *Taft* were isolated events made contrary to established corporate policy; no directors or officers of WEC knew of the payments or were in any way involved; there were no intentionally false statements made by any WEC officer or director, WEC voluntarily disclosed information of the payments to this agency; the misconduct was totally unrelated to the operations of the broadcast subsidiaries; and no one in the broadcast subsidiaries had any relation to or connection with the wrongdoers or their areas of operation.

247. Whatever the similarity of other cases, RKO argues that its disqualification here would amount to a penalty, especially since the Commission allegedly would be enforcing laws which lie outside its jurisdiction. RKO asserts that such a disqualification would have a catastrophic effect upon RKO and its broadcast stations.

248. We have explained the relevance of non-broadcast misconduct elsewhere in this opinion and see no reason to repeat it here. However, we do with to emphasize, as we have stated before, that denial of renewal is not a

penalty, since there is no automatic right to a license. Retention of an existing license is a privilege which must be earned.[475] Particularly relevant is the Supreme Court's holding in *FCC* v. *WOKO, Inc., supra.* There the Commission denied a renewal application because of misconduct by the principal of a corporate applicant. On appeal, the applicant argued that the Commission's decision would harm innocent stockholders and was, in any event, a penalty. The United States Supreme Court rejected those arguments with the following language:

> [A]s [a] matter of law, the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception . . . . [I]n this as in other matters, stockholders entrust their interests to their chosen officers and often suffer for their dereliction. Consequences of such acts cannot be escaped by a corporation merely because not all of its stockholders participated.
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> It also contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. We think it unnecessary to indulge in the exposition of what a penalty is. It is enough to decide this case to know what a penalty is not. A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact. 329 U.S. at 227, 228.

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[475] See e.g., *Golden Broadcasting Systems, Inc., supra,* 68 FCC 2d at 1107-1108 (1978). "[T]he withholding of a privilege, granted by the Government only to duly-qualified applicants, [does not] amount to a penalty when there is sound basis for finding the applicant unfit." *Mansfield Journal Co.* v. *FCC, supra,* 180 F.2d at 35.

249. Accordingly, despite the impact which any adverse action might have on RKO's financial interests, the Commission is required to examine character rather than the possible economic consequences of disqualification.[476] Indeed, it is not the size of the corporation but the nature and degree of wrongdoing reflecting on a licensee's qualifications that is of decisional significance. Nor can RKO plead for special consideration when it, as all licensees, has been on notice since the 1951 Policy Statement that non-broadcast related misconduct could be disqualifying. In sum, our sole goal has been to ensure that a scarce public resource is used to foster the public interest. We have fully considered the consequences of our action and have decided to take these measures only upon our determination that General Tire and RKO have shown, by their previous conduct, that they cannot be entrusted to conform their future behavior to proper standards and that they will not or cannot carry out the public responsibilities involved in station operation. We thus remain convinced that the public interest would best be served by denial of the license renewal application for Station WNAC-TV.[477]

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[476] *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1043-1044 (1972).

[477] Under Sections 307-309 of the Communications Act, our function is to determine whether to grant a privilege to act as a trustee of a scarce public resource, not to assess a penalty for past misconduct. Consequently, a case like *Steadman* v. *SEC*, 603 F.2d 1126 (5th Cir. 1979), *cert. granted* (No. 79-1266), is inapposite. *Steadman* required the SEC to articulate more fully why it chose the harshest available sanction—industry expulsion—to punish certain securities law violations. Even if *Steadman*, despite its penal focus, has some marginal relevance to FCC licensing proceedings, we have no difficulty explaining why disqualification is the only appropriate decision here. Short-term conditional nenewal, renewal accompanied by a monetary forfeiture or periodic reporting, or imposition of a comparative demerit, all presuppose a finding that RKO has the requisite basic character qualifications, i.e., that it can be trusted to be honest and forthright with the Commission and generally respect applicable laws, rules and policies. Based on

III. *Further Proceedings*

250. Having concluded that RKO lacks the requisite qualifications to remain a licensee of Station WNAC-TV, we must decide whether the license for that station can be awarded to Community, Dudley, or NETV. On March 5, 1980, NETV, Community, and Dudley filed a Joint Petition for Immediate Approval of Settlement Procedures. Those parties request that the Commission approve the merger of Dudley and Community into NETV and allow the substitution of NETV for Community as party to this proceeding; grant a construction permit to NETV to operate Channel 7 in Boston; and approve in principle a transaction providing for the purchase of the physical assets and goodwill of WNAC-TV for $54,000,000. On March 13, 1980, RKO filed its Opposition to the Joint Petition. In essence, RKO argues that the decision of the Commission announced on January 24, 1980 disqualifying RKO is in error and, therefore, that the underlying premise of the Joint Petition is faulty, RKO also suggested a counter proposal which would resolve this proceeding.

251. We are not prepared to act on the Joint Petition or the counter proposal at this time. To begin with, the Joint Petition leaves many questions unanswered. For instance, the Petition states that "NETV, Community and Dudley specifically represent that by filing this request and supporting materials, they have not waived any right to proceed individually or collectively as if this request and supporting materials had not been filed." [478] This language is clearly ambiguous and creates substantial doubt as to which application the Commission should

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the record before us, we cannot conscientiously make such a finding. Indeed, were we to find RKO basically qualified, that would destroy the credibility of our long-standing, court-endorsed requirement that license applicants must be honest and forthright when dealing with the Commission.

[478] Joint Petition at 15.

consider in evaluating the Joint Petition. Similarly, we note that no agreement has been reached between joint petitioners and RKO. We therefore direct Community, Dudley, and NETV to file comments within 30 days from the release date of this Decision proposing a specific course of action to be followed in the Boston proceeding. The parties should state clearly whether they intend to prosecute their respective applications in light of the decision released today. Within 20 days after the filing of those comments, RKO and the Broadcast Bureau should file reply comments. All parties should feel free to address any and all matters they feel pertinent to a Commission determination on further proceedings.

252. As explained previously, the renewal of RKO's license for Station KHJ-TV was conditioned on the outcome of the instant proceeding. By separate order, we are therefore concluding that RKO is not qualified to remain a licensee of that station. That separate order will also direct the parties in that proceeding to file comments concerning a specific course of action to be followed in the Los Angeles proceeding.

253. In the proceedings involving Station WOR-TV, Channel 9 of New York City, the Commission stated that the findings made in the instant proceeding with respect to RKO's qualifications would be *res judicata* in the New York proceeding. By separate order issued in the latter docket, we are therefore concluding that RKO does not possess the requisite qualifications to be the licensee for Channel 9 in New York. In that same order, we are also directing the parties to that proceeding to file comments concerning a specific course of action to be followed in the New York proceeding.

254. The last matter to be considered concerns the licenses which RKO holds for 13 other broadcast stations. Over the past several years we have regularly conditioned renewal of those stations on the outcome of, and without prejudice to, Commission action resulting from the instant

proceeding. On March 13, 1980, RKO offered a new "spin-off" proposal whereby those 13 other broadcast stations would be transferred to a new corporation.[479] We are not prepared at this point to dispose of that or any other new proposal. We invite RKO and other interested parties to file whatever comments they choose within 30 days from the release date of this order concerning what action, if any, the Commission should take with respect to those 13 other broadcast stations. RKO and all interested parties who have filed comments will then be given an additional 15 days to file reply comments. The Commission will then make a decision as to what action should be taken with respect to RKO's other licenses in light of today's decision. The Commission believes that the public interest requires a prompt determination as to what action should be taken regarding the 13 stations. Accordingly, the Commission does not intend to entertain requests for extension of the 30-day comment and 15-day reply comment deadlines. In order to afford the Commission an adequate opportunity to consider those comments and reply comments and to make a prompt, reasoned determination from the full universe of presently available options, the Commission, pursuant to the "[u]nless otherwise directed" language of Section 73.3539(a) of the Rules, 47 C.F.R. § 73.3539(a), hereby directs that RKO need not file its renewal applications for Station KFRC (San Francisco) and Stations KHJ and KRTH(FM) (Los Angeles) on August 1, 1980, but may file such applications anytime on or prior to October 1, 1980. Consistent with Sections 73.3516(c) and (e) of the Rules, 47 C.F.R. §§ 73.3516(c) and (e), and established Commission practice, petitions to deny such renewals and applications for construction permits for new broadcast stations mutually exclusive with any of the three RKO stations will not be accepted for filing until after the filing of RKO's renewal application for the station (KFRC, KHJ, KRTH(FM)) to which such petition or mutually exclusive application relates.

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[479] Comments of RKO General, Inc. on Settlement Procedures.

Conclusion

255. Today's decision has been made after a thorough review of the record and the arguments of the parties. Every party has been given due notice of the issues to be considered. Every party has been given ample opportunity to present facts, information, and arguments to the Commission. In reaching our decision we have relied on the records established through hearing, the undisputed evidence, and the reasonable inferences to be drawn from those undisputed facts. In assessing that record we have applied the same standard we apply to all our broadcast licenses. We cannot compromise the integrity of that standard because the value of the broadcast property is larger than in some other cases.

256. In general, the evidence is clear and convincing that RKO has engaged in a variety of misconduct which renders it unfir to be a Commission licensee for Channel 7 in Boston. RKO has engaged in an improper reciprocal trades program that was anticompetitive, it has knowingly filed false financial statements with this Commission, and it has not been entirely honest and forthcoming in its dealings with the Commission in these proceedings. Our concern here is heightened by the misconduct engaged in by RKO's parent, General Tire. General Tire not only controls RKO as a legal matter; the record also demonstrates that General Tire has exercised practical control over RKO operations in certain respects and has involved the broadcast operations in serious misconduct. It is that close legal and practical relationship that further taints RKO's qualifications. This record thus compels the conclusion that we cannot trust RKO to operate Channel 7 in the future in a manner consistent with the public interest.

257. ACCORDINGLY, IT IS HEREBY ORDERED:

(a) That the Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearings, filed December 10, 1975; and the Dudley Motion for Further Relief, filed August 15, 1977 ARE GRANTED to the extent reflected in the decision and DENIED in all other respects;

(b) That the Community Motion to Deny RKO's License Renewal or, in the Alternative, Hold Further Evidentiary Hearings, filed September 13, 1977 IS GRANTED;

(c) That the Motion of the National Citizens Committee for Broadcasting and the Friars of the Atonement for Leave to File a Brief as *Amici Curiae*, filed June 20, 1976 IS GRANTED;

(d) That the Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules, filed April 7, 1977 IS DISMISSED as moot;

(e) That the Joint Petition for Approval of Agreement filed by RKO, Community, Dudley, and New England Television Corporation on August 28, 1978 IS DISMISSED as moot;

(f) That the Fidelity Petition to Deny filed October 6, 1978; and the Multi-State Petition Pursuant to Section 1.580(i) filed October 6, 1978 ARE DISMISSED as moot;

(g) That RKO's Motion for Leave to File Comments filed December 7, 1978; and Fidelity's Motion for Leave to File a Reply, filed December 21, 1978 ARE GRANTED;

(h) That the Joint Motion for Expeditious Disposition, Within Thirty Days, if Possible, filed by New England Television Corporation, Community, and Dudley on March 7, 1979 IS DENIED;

(i) That the Petition for Leave to Intervene filed by Hub Broadcasting Inc. on October 30, 1979 IS DENIED;

(j) That the RKO application for renewal of the license (File No. BRCT-63) for Station WNAC-TV at Boston, Massachusetts, IS DENIED;

(k) That RKO General, Inc. IS AUTHORIZED to continue to operate Station WNAC-TV until 12:01 a.m., July 7, 1980, to enable the licensee to conclude the station's affairs; provided, HOWEVER, That if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station WNAC-TV until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate;

(l) That within thirty (30) days from the release date of this decision, Community Broadcasting of Boston, Inc., The Dudley Station Corporation, and New England Television Corporation ARE DIRECTED TO SUBMIT pleadings consistent with the instructions set out in paragraph 251, *supra*, concerning the course of action to be followed to bring this proceeding to an end, with reply comments to be filed by RKO General, Inc. and the Broadcast Bureau within twenty (20) days thereafter;

(m) That within thirty (30) days from the release date of this decision, RKO General, Inc. and all other interested parties SHALL FILE comments consistent with the instructions set out in paragraph 254, *supra*, concerning the action to be taken by the Commission with respect to RKO's other broadcast licenses, with all parties filing initial comments afforded an opportunity to file reply comments within fifteen (15) days thereafter; and

(n) That notwithstanding sections 73.1020(a) (15) and 73.3539(a) of the Rules, 47 C.F.R. §§ 73.1020(a)

(15) and 73.3539(a), RKO General, Inc., NEED NOT FILE its renewal applications for Stations KFRC, KHJ, or KRTH (FM) until October 1, 1980 and petitions to deny or mutually exclusive applications SHALL NOT BE ACCEPTED for filing until RKO files such renewal applications.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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Appendix A

Pleadings Considered in the RKO General, Decision WNAC-TV (Boston, Mass.)

A. Limited Exceptions to Initial Decision and Brief, both filed September 5, 1974, by the Broadcast Bureau (the Bureau).

1. Reply to the Exceptions of the Bureau, Dudley and Community filed October 18, 1974, by RKO General, Inc. (RKO).
2. Reply Brief to the Exceptions and Briefs of the Bureau, Community and RKO, filed October 18, 1974, by The Dudley Station Corporation (Dudley).

B. Statement in Support of Initial Decision with Limited Exceptions and Brief, both filed September 6, 1974, by RKO.

1. Reply Brief to RKO's Statement in Support and Limited Exceptions filed October 18, 1974, by Community Broadcasting of Boston, Inc. (Community).
2. Reply to RKO's Exceptions and Brief filed October 18, 1974, by the Bureau.

C. Exceptions to Initial Decision and Brief, both filed September 6, 1974, by Community.

1. Reply to Community's Exceptions and Brief filed October 18, 1974, by the Bureau.

D. Exceptions to Initial Decision and Brief, both filed September 6, 1974, by Dudley.

1. Reply Brief to Dudley's Exceptions and Brief filed October 18, 1974, by Community.
2. Reply to Dudley's Exceptions and Brief filed October 18, 1974, by the Bureau.

E. Petition to Reopen the Record, Enlarge the Issues, and Remand for Further Hearing filed December 10, 1975, by Community.

1. Comments on Community's Petition filed January 21, 1976, by Dudley.
2. Comments on Community's Petition filed January 21, 1976, by the Bureau.
    a. Supplement to its Comments filed October 4, 1977, by the Bureau.
3. Opposition to Community's Petition filed January 21, 1976, by RKO.
    a. Reply to Opposition of RKO and Comments of the Bureau and Dudley filed February 11, 1976, by Community.
        (1) Supplement to its Reply filed March 16, 1976, by Community.
            (a) Comments on Community's Supplement filed March 22, 1976, by the Bureau.
4. Supplement to its December 10, 1975 Petition to Reopen the Record filed June 18, 1976, by Community.
    a. Opposition to Community's Supplement filed June 28, 1976, by RKO.
    b. Comments on Community's Supplement filed June 28, 1976, by the Bureau.
5. Motion for Further Relief filed August 15, 1977, by Dudley.
6. Motion to Deny RKO's License Renewal or, in the Alternative, Hold Further Evidentiary Hearings filed September 13, 1977, by Community.
    a. Comments on Community's Motion and the Bureau's October 4, 1977 Supplemental Comments filed October 28, 1977, by Dudley.

- b. Response to Community's September 13, 1977 Motion, Dudley's August 15, 1977 Motion, and the Bureau's October 4, 1977 Supplemental Comments filed October 28, 1977, by RKO.
  - (1) Reply to RKO's Response filed December 16, 1977, by Dudley.
  - (2) Reply to RKO's Response filed December 16, 1977, by Community.
    - (a) Response to Community's Reply filed April 6, 1978, by RKO.

F. Motion for Leave to File a Briefi as *Amici Curiae* with Brief, both filed June 29, 1976, by the National Citizen's Committee for Broadcasting and the Friars of the Atonement.

1. Comments on the Motion for Leave to File a Brief as *Amici Curiae* filed July 6, 1976, by the Bureau.
2. Opposition to the Motion for Leave to File a Brief as *Amici Curiae* filed July 6, 1976, by RKO.

G. Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules filed April 7, 1977, by Community.

1. Opposition to Community's Petition filed April 18, 1977, by RKO .

H. Joint Petition for Approval of Agreement filed August 28, 1978, by RKO, Community, Dudley, and New England Television Corporation (NETV).

1. Statement Pursuant to Paragraph 13(c) of the Assignment Contract filed October 20, 1978, by Community, Dudley and NETV.
2. Comments on the Joint Petition filed September 12, 1978, by the Bureau.

- a. Supplement to Comments filed September 14, 1978, by the Bureau.
- b. Reply to the Comments and Supplement filed October 6, 1978 by RKO, Community, Dudley and NETV.
    - (1) Addendum to Reply filed October 12, 1978 by RKO, Community, Dudley and NETV.

3. Petition to Deny and Comments on the Joint Petition for Approval of Agreement filed October 6, 1978, by Fidelity Television, Inc. (Fidelity).

4. Petition Pursuant to Section 1.580(i) filed October 6, 1978, by Multi-State Communications, Inc. (Multi-State).

- a. Joint Opposition to the Petitions of Fidelity and Multi-State filed October 26, 1978, by RKO, Community, Dudley and NETV.
    - (1) Reply to the Joint Opposition filed November 7, 1978, by Multi-State.
    - (2) Reply to the Joint Opposition filed November 13, 1978, by Fidelity.
        - (a) Motion for Leave to File Comments and Comments on Fidelity's November 13, 1978 Reply, both filed December 7, 1978, by RKO.
            - (i) Motion for Leave to File Reply to RKO's December 7, 1978 proposed comments, filed December 21, 1978, by Fidelity.

I. Joint Motion for Expeditious Disposition, Within Thirty Days, If Possible, to Comport with Minority Ownership Policies, filed March 7, 1979, by NETV, Community and Dudley.

1. Comments on the March 7, 1979 Motion for Expeditious Disposition filed March 13, 1979, by Fidelity.

2. Comments on the March 7, 1979 Motion for Expeditious Disposition filed March 16, 1979, by Multi-State.

J. Summaries of Positions filed July 9, 1979:

1. By RKO.
2. By Community.
3. By Dudley.
4. By NETV.
5. By Fidelity.
6. By Multi-State.
7. By the Bureau.

K. Proposed Findings, Conclusions and Proffered Evidence filed August 27, 1979:

1. By RKO.
2. By Community.
3. By Dudley.
4. By NETV.
5. By Fidelity.
6. By Multi-State.
7. By the Bureau.

L. Replies filed September 24, 1979:

1. By RKO.
2. By Community.
3. By Dudley.
4. By NETV.
5. By Fidelity.
6. By Multi-State.
7. By the Bureau.

M. Petition for Leave to Intervene filed October 30, 1979, by Hub Broadcasting Inc. (Hub).

1. Opposition to Petition for Leave to Intervene filed November 9, 1979, by Fidelity.
2. Opposition to Petition for Leave to Intervene filed November 9, 1979, by Multi-State.
3. Opposition to Petition for Leave to Intervene filed November 9, 1979, by NETV.
4. Opposition to Petition for Leave to Intervene filed November 9, 1979, by the Broadcast Bureau.
5. Opposition to Petition for Leave to Intervene filed November 9, 1979, by RKO.
    a. Reply to the Oppositions of the other parties filed November 21, 1979, by Hub.

APPENDIX B

Rulings on Exceptions of RKO General, Inc. to the Initial Decision

Exception No.	Rulings
1, 3, 19, 23, 27, 28, 45, 47, 56-60, 65-67, 69-83	*Denied.* The pertinent facts are adequately and correctly set forth in the Initial Decision.
2	*Granted* to the extent reflected in paragraphs 224 and 225 of the decision.
4, 18, 20-22, 24-26, 29, 30, 32-44, 62, 68, 85(a), 90-93, 97	*Denied* as decisionally insignificant.
5-17, 49-51, 84, 94, 98-106	*Deferred* pending receipt of additional pleadings from the parties to this proceeding.
31	*Denied* as not supported by the record.
46	*Granted* to the extent that RKO is correct that there were no specific standards for complying with Section 317 of the Communications Act prior to the release of the Commissions Public Notice. *In re* Application of Sections 317 and 508 of the Communications Act to "Kickbacks" of Fees Paid to Performers, 23 FCC 2d 588, 19 RR 2d 1581 (June 4, 1970).
48	*Denied.* The Pertinent facts are adequately and correctly set forth in the Initial Decision. Mitigating evidence was fully considered to the extent relevant to the fact of violation.
52	*Denied* as contrary to the record. Moreover, the pertinent facts are adequately and correctly set forth in the Initial Decision.
53	*Denied* as contrary to the record. The many instances of reciprocal purchases and sales are well documented by the record.

Exception No.	Rulings
54	*Denied.* While there may have been only two instances of reciprocal dealings between trucking companies and RKO broadcast stations, these examples, coupled with the other instances involving RKO, demonstrate the interrelationship between RKO and General Tire and the improper use of RKO's broadcast facilities.
55	*Denied.* The pertinent facts are adequately and correctly set forth in the Initial Decision. In particular, the broad general information about reciprocal trade practices is set forth in paragraphs 58-78 of the decision. RKO's exceptions as to the relationship between RKO and General Tire are contrary to the record. See paragraphs 100-123 of the decision. Moreover, details of RKO's advertising solicitation practices are not decisionally significant. Finally RKO's exceptions concerning the advertising solicitation practices of WNAC-TV are not supported by the record.
61	*Denied* as irrelevant and not supported by the record.
63	*Denied* as contrary to the record. See paragraph 83 of the decision.
64	*Denied.* The pertinent facts are adequately and correctly set forth in paragraph 275 of the Initial Decision and paragraph 82 of our decision.
85(b)	*Denied.* See the decision, paras. 73, 85-92.
85(c)	*Denied.* See the decision, para. 87.
85(d)	*Denied.* The Commission is not concerned with statutory violations, *per se*, but with the anticompetitive nature of reciprocity.

Exception No.	Rulings
85(e)	*Denied.* The practices of other corporations are irrelevant to the conduct expected of a broadcast licensee, especially where the conduct involves the licensee's broadcast properties. See the decision, para. 74.
85(f)	*Denied.* This portion of the exception is contrary to the record. There is proof of systematic reciprocity on the part of General Tire. Moreover, even though RKO may not have been involved in many of these arrangements, there is adequate proof that General Tire was not reluctant to use RKO, where possible, in its reciprocal trade practices. See the decision, paras. 79, 80, 82 and 83.
86	*Denied.* In concluding that General Tire engaged in reciprocal practices the Commission considered the anticompetitive nature of the practices (the agreements to sell or buy only from General Tire's friends) and the threat and/or actual withdrawal of business for trade relations purposes. Moreover, the record reveals a number of complaints raised by companies doing business with General Tire, *e.g.*, Braswell Freight Lines and Equitable Life Assurance Company.
87	*Denied.* Although General Tire's trade relations practices did not always involve RKO, there is sufficient evidence to show that RKO in fact obtained advertising business as a result of General Tire's reciprocal dealings, *e.g.*, Equitable Life Assurance Company and Lyon Van Lines, Inc.

Exception No.	Rulings
88	*Denied.* The record is replete with instances where General Tire's trade relations affected the purchasing and sales decisions of its subsidiaries, *e.g.*, Hennis Freight Lines, Carnation Company, and Sherwin-Williams Co. Moreover, the development of General Tire's trade relations department amply demonstrates the company's systematic use of reciprocity to increase sales.
89	*Denied.* The issue added by the Review Board involves Section 317 of the Act and Section 73.654 of the Commission's Rules which are interrelated with Section 508 of the Act. This interrelationship makes the latter section a proper subject for Commission concern in this proceeding.
95, 96	*Granted* to the extent reflected in paras. 225 and 227 of the decision.

Rulings on Exceptions of Community Broadcasting of Boston, Inc. to the Initial Decision

Exception No.	Rulings
1(a), 1(b), 4(a), 4(b), 5, 29-50, 54, 55, 57-61, 63, 65-68, 70-73, 75, 79-115, 117-119, 121(c), 121(d), 122(c), and (d), 123(j), (k), (l), (p), (y), and (aa), 138(d), 146, 147	*Denied* as decisionally insignificant.
2	*Denied.* Paragraphs 8-11 of the Initial Decision are relevant in that they provide important background information pertaining to RKO's evolutional development.
3, 123(g) and (x), 134	*Denied* as not supported by the record.

Exception No.	Rulings
6-28, 116, 180, 193-195, 200, 202, 204	*Deferred* pending receipt of further pleadings from the parties to this proceeding.
51-53, 56, 64, 69, 74, 78, 120, 122(a), (b), (e) and (g), 123(c), (d), (f), (g), (h), (i), (m), (n), (o), (u), (v), (w), and (z), 125(a) and (c), 126(a) and (b), 127(a), 130(a), 131, 132(a), (b) and (c), 135-137, 139-141, 143, 148-155, 158 (at page 176), 159-169	*Denied.* The pertinent facts are adequately and completely set forth in the Initial Decision.
	Granted to the extent reflected in paragraph 221 of the decision.
121(a) and (b)	*Denied.* The record accurately reflects the nature of General Tire's trade relations with the trucking industry.
121(e)	*Granted* to the extent the record reflects the use of reciprocal trade deals involving RKO (See paragraphs 83 of the decision).
122(f)	*Granted* to the extent the record reflects T. F. O'Neil and RKO's involvement in General Tire's reciprocal dealings (See paragraph 105 of the decision).
123(a), (b), (e) and (r), 125(b), 138(a), (b) and (c)	*Granted* to the extent the record reflects RKO's involvement in General Tire's reciprocal dealings.
123(s) and (t)	*Granted* to the extent the record reflects use of reciprocal deals to obtain additional business for General Tire's subsidiaries.
124	*Granted* to the extent the record reflects RKO's involvement in General Tire's reciprocal dealings (See paragraph 110 of the decision).

Exception No.	Rulings
127(b)	*Granted* to the extent the record reflects that General Tire took affirmative steps to eliminate use of Hennis Freight Lines as a carrier wherever possible.
128(a) and (b)	*Granted* to the extent the record reflects the coercive nature of General Tire's reciprocal dealings.
129(a) and (b)	*Granted* to the extent the record reflects General Tire's practice of eliminating carriers not providing General Tire with a proportionate share of tire business.
129(c) and (d)	*Granted* to the extent the record reflects General Tire's practice of reducing use of carriers not purchasing a proportionate share of General tires.
129(e), 130(b) and (c)	*Granted* to the extent the record reflects the nature of General Tire's reciprocal dealings.
132(d), (e), (f) and (g)	*Granted* to the extent the record reflects RKO's involvement in General Tire's reciprocal dealings (See paragraphs 83 and 115 of the decision).
133	*Granted* to the extent the record reflects RKO's involvement in General Tire's reciprocal dealings. Although the ALJ found only one instance where reciprocal relations between General Tire and a trucking company involved RKO, the record clearly demonstrates a second instance involving Bekins Van Lines. This is in fact conceded by RKO (RKO proposed findings of September 10, 1973, Appendix A, pp. 333-334 and RKO's October 18, 1974 Reply to the Exceptions of the other parties, pp. 48-49) and substantiated by Community (Community Ex. 101).

Exception No.	Rulings
142	*Denied.* Although the referenced documents reflect an inclination to enter into a trade relations agreement with Ashland Oil, the ALJ was correct in finding that there was no evidence of such an agreement between Ashland and General Tire.
144	*Denied.* While the documents refer to General Tire's desire to enter into a trade relationship with Airco, Inc., there is insufficient evidence to find a reciprocal agreement between Airco and General Tire.
145	*Denied.* Linde Company is a subsidiary of Union Carbide and findings as to this company were adequately made in paragraph 317 of the Initial Decision.
156	*Denied.* The testimony of Fidelity's expert witness, Dr. Theodore J. Kreps, was adequately considered in the KHJ-TV proceeding which we have incorporated by reference. See n.76 of the decision.
157	*Denied.* The limited nature of the inquiry and the testimony adduced during the course of that proceeding support the findings and conclusions of the ALJ concerning the question of RKO's candor in the KHJ-TV proceeding.
158 (at page 184)	*Denied.* The requested findings are irrelevant to the question of whether RKO personnel lacked candor in testifying in the KHJ-TV proceedings.
158 (at page 190)	*Granted* to the extent the record demonstrates that M.G. O'Neil was directly involved in General Tire's trade relations. See, *inter alia*, paragraphs 271, 318 and 367 of the Initial Decision.

Exception No.	Rulings
170, 171, 177, 179, 181-187, 192, 196, 199	*Denied* as irrelevant in light of the substitution of our conclusions for those of the ALJ.
172	*Granted.* The record is replete with instances demonstrating that General Tire engaged in coercive reciprocity. See, for example, paragraph 83 of the decision and paragraphs 280-282 of the Initial Decision.
173	*Granted* to the extent the record reflects General Tire's participation in anticompetitive conduct. See paragraphs 88, 89 and 92 of the decision.
174	*Granted* to the extent that the record amply supports the conclusion that General Tire engaged in anticompetitive practices (see paragraphs 88, 89 and 92 of the decision) and that RKO did not have an unblemished record (see paragraphs 164, 179, 196, 207, 218, 226, 228 and n.352 of the decision).
175	*Granted* to the extent that the record amply supports the conclusion that General Tire engaged in coercive and non-coercive reciprocal trade practices during the 1960's; that RKO was involved in these practices; and that these factors, considered with the other documented wrongdoing, constitute sufficient reason to find RKO unqualified to remain the licensee of Station WNAC-TV.
176, 178	*Denied.* The ALJ's conclusions accurately reflect the facts of record.
188	*Granted* to the extent the record reflects deficiencies in RKO's service to the public. See paragraphs 226-231 of the decision.

Exception No.	Rulings
189	*Denied.* The record amply supports the conclusion that RKO's pioneering use of feature movies was an innovative step in television broadcasting.
190	*Denied.* The record amply supports the conclusion that RKO had a wide variety of programs notwithstanding the noted overreliance on feature films.
191, 191(a)	*Denied.* The witnesses' perception of WNAC-TV's service reflects their opinions, as correctly summarized by the ALJ.
197	*Granted.* The trade relations practices reflect adversely on RKO because of the interrelationship between RKO and General Tire, the anticompetitive nature of these practices, and the involvement of RKO facilities in these practices.
198	*Granted* to the extent the record reflects RKO's propensity to violate the Commission's rules and RKO's inadequate supervision. Denied in all other respects as decisionally insignificant in light of RKO's disqualification.
201	*Granted.* Based on the entire record the Commission concludes that grant of RKO's renewal application for Station WNAC-TV would not serve the public interest, convenience and necessity. As noted in paragraphs 226-231 of the decision, RKO's past program record fell far short of overcoming the numerous deficiencies in RKO's and General Tire's conduct.
203	*Denied* as decisionally insignificant and inconsistent with Section 1.277(a) of the Commission's rules.

Rulings on Exceptions of The Dudley Station Corporation to the Initial Decision

Exception No.	Rulings
1-133, 137, 139-149, 151, 152, 155, 156, 201-216, 219, 221-225, 227-299, 314, 315, 318, 325 and 326	*Denied* as decisionally insignificant.
134-136, 138, 150, 153, 154, 157-200, 305-312, 317, 321-324 and 327	*Deferred* pending receipt of further pleadings from the parties to this proceeding.
217, 218, 300-302, 316	*Denied* as not supported by the record.
220, 226, and 319	*Granted* to the extent reflected in paragraphs 225-226 of the decision.
303, 304, and 313	*Granted* to the extent reflected in paragraphs 85-92 of the decision.
320	*Deferred* to the extent it pertains to the qualifications of Dudley and denied in all other respects as decisionally insignificant.
328	*Granted* to the extent that we now find RKO unqualified to be the licensee of WNAC-TV and *Deferred* in all other respects.

Rulings on Exceptions of the Broadcast Bureau to the Initial Decision

Exception No.	Rulings
1, 2	*Granted.* The record amply supports the conclusion that General Tire and its subsidiaries engaged in coercive reciprocity in its dealings with several trucking companies. See paragraph 81 of the decision.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

IN RE: RKO GENERAL, INC. (WNAC-TV)

Capital Punishment

The lawyers tell me that the denial of one license—or three or even sixteen licenses for operating stations—isn't a punishment. It is just the loss of a privilege. Unfortunately, whether one talks about punishment or privilege, the bottom line is the same. RKO has only a limited time to live on television channels in Boston, Los Angeles, and New York City, and its other thirteen radio and television licenses are in jeopardy. A decision with such serious consequences should be made only on the basis of real wrongdoing by the licensee and only after the Commission has given the licensee those due process rights insured by the Communications Act.

I certainly cannot say that RKO is the best applicant for a license the Commission has ever seen. If any competing applicants were before me, I would have to consider RKO's background a substantial drawback for comparative purposes. However, that is not the case here. The only question being addressed at this time is whether RKO should be considered at all. The majority have said "no" in a decision with serious flaws.

One major problem with this decision is the majority's treatment of the reciprocal trade practices issue. When the generalizations about the seriousness of anticompetitive practices and the scholarly treatise on the law of reciprocity are set aside, the Commission is left with a list of companies with whom General Tire did business and with whom General Tire "trade relations" people discussed reciprocal trade relations fifteen or twenty years ago. Some of these contacts were clearly legal by any standards; some were allegedly illegal, although no forum made specific findings on this point; some contacts fell into that gray area where the law is unclear or was unclear when the contacts occurred. What is relevant here according to the *Uniform Policy on Violation of Laws,* 42 FCC 2d 399 (1951), is conduct having some relationship to RKO's ability to operate broadcast stations in the public interest. In light of RKO's long history as a broadcaster, the most relevant conduct for the purpose of predicting how RKO will perform in the future is its past conduct as a broadcaster.

The Commission has already looked at RKO's involvement in reciprocal trade practices. In its KHJ-TV decision, *RKO General, Inc.,* 44 FCC 2d 123 (1973), the Commission considered several situations which were raised in the context of the Justice Department's antitrust suit. It concluded on the basis of that record that the contacts were not disqualifying and were not even worth a comparative demerit. The court of appeals affirmed:

> The evidence in this case largely shows, as the agency opinion found, ineffective attempts at reciprocity, particularly with respect to KHJ. At best, there is doubt whether unilateral, unsuccessful attempts at reciprocity constitute an antitrust violation. In the General Dynamics case, so far the most expansive on the subject, only successful completed efforts were considered by the court in determining whether the Sherman Act had been violated. We do not think the FCC is required to go further than the court—particularly with respect to an earlier period in which the law and the general practice were even less clear than today.
>
> There are also instances in the record of successful reciprocity. Most of these have little to do with RKO, and even less with KHJ, whose ratings at times were so poor that, even with the added push of reciprocity, no advertising was received. In addition, as was typical following the coercive reciprocity cases of the 1930s, it appears that the reciprocity

> shown in this record was considered mutually beneficial by both companies, and that although purchases might in some cases be rerouted in response to reduced sales, General did not attempt to use coercion as an inducement.
>
> Contemporary sources indicate that this type of non-coercive reciprocity was extremely widespread in the early 1960s, but more recent writings suggest that it has largely been abandoned in recent years. The practice was not affirmatively declared illegal until the 1966 General Dynamics case, and even there the merger context might have accounted for the ruling. General Tire has been since 1970 under a consent decree which prevents it from engaging in most sorts of reciprocal trade relations. In these circumstances, and remembering that KHJ was only a small part of what went on and that antitrust considerations are only one segment of the Commission's concern with the character of a broadcast applicant, we find that the FCC did not act arbitrarily, capriciously, or illegally in refusing to give RKO a demerit or to disqualify it for the reciprocity practices outlined in this record.

Fidelity Television, Inc. v. *FCC*, 515 F. 2d 684, 697-698, *Rehearing Denied* 515 F. 2d 703 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975) (citations and footnotes omitted).

Both the Commission and the court noted that additional evidence in this case could cause the Commission to reach a different conclusion about the significance of the trade relations for RKO's qualifications. However, after scrutinizing 171 companies in this case (the 22 companies studied in the KHJ-TV hearing plus an additional 149), the majority rely on the incidents studied in the KHJ-TV hearing for the analysis in paragraph 83 of RKO's involvement in reciprocal trade practices they consider to be improper.[1] The problem is that the majority use essentially the same evidence considered in the KHH-TV hearing to reach the opposite conclusion, which they explain only in a sentence in note 156: "Due to the more complete record and our closer examination of the law, we have a greater appreciation now for the adverse impact on reciprocal trade practices on the broadcast industry . . . ." I don't find this much of an explanation for a radical change in outcome.

Another major problem with this decision is the majority's treatment of RKO's reporting of trade and barter information on its annual financial reports. The memorandum method of accounting used at RKO stations was an accepted accounting practice for many years, and the Commission has recognized in its instructions to Schedule 1 of FCC Form 324 that values for trade and barter income are, at best, estimates. From the limited record available on this issue, it appears that RKO was sloppy in its record keeping and that RKO officers knew of this sloppiness at the stations. However, this known sloppiness hardly reaches the proportions of the "deception" in *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), relied on by the majority. It also fails to reach the proportions of a disqualifying lack of control such as that found in *United Broadcasting Co.*, 55 FCC 2d 416 (1975), *reconsideration denied*, 59 FCC 2d 663 (1976), where control problems led to serious programming abuses.

---

[1] The reference in note 156 to seven companies studied only in the WNAC-TV hearing does not support a finding that RKO is not qualified to be a licensee. In two cases, the companies did substantial amounts of broadcast advertising and purchased time on RKO stations before trade relations were considered, WNAC-TV I.D. paras. 292, 317; in a third case, the record includes documents showing that trade relations were not involved in dealings between the companies. WNAC-TV I.D. para. 297; in additional cases the record does not show threats, coercion, or any changes in buying practices, WNAC-TV I.D. paras. 310, 327, 333. While the record does not support a finding that no consideration was given to RKO in some of General Tire's trade relations efforts, this sparse additional record of meetings or letters occurring or written at about the same time as the incidents developed in the KHJ-TV hearing does not support the majority's disqualification conclusion.

The most serious problem with the majority's decision is the procedural one. Section 309(e) of the Communications Act provides:

> (e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest] finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

I don't know what could be a clearer statement of a process required by statute. However, the majority here find RKO disqualified on the basis of issues that were never designated against it and that were not included in the hearing.

While I appreciate the length of time this case has gone on, delay alone is no excuse for short-circuiting procedures required by the Communications Act and basic fairness. RKO was entitled to know from the Commission, not from the pleadings of its adversaries, which issues were potentially of decisional significance to the denial of its application. It was not so informed about the alleged false certification of financial reports, the alleged lack of candor, and other matters developed in its Special Report to the SEC. Although the majority rely on *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28 (D.C. Cir. 1950). To support the adequacy of RKO's notice about the issues, the question there was a semantic point about the wording of an issue already designated by the Commission. Here the issues were not designated. We have only the pleadings asking for issues.

The majority have also misplaced their reliance on *Grenco, Inc.*, 39 FCC 2d 732 (1973), and *Rocket Radio, Inc.*, 70 FCC 2d 413 (Rev. Bd.), *reconsideration granted in part and denied in part*, 70 FCC 2d 495 (Rev. Bd. 1977), to support their conclusion that RKO had adequate knowledge of the candor issue. *Grenco* dealt with the credibility of a witness during the hearing; the question about notice of a perjury issue was mooted by the Commission's favorable finding on the substantive point. *Rocket Radio* involved the adequacy of notice about an issue explored during a hearing. Without notice of the issues from the Commission, RKO was left in the position of shooting blindly into the air when it should have had a clear view of the target.

Even if the notice to RKO was adequate, a suggestion I am making only for the sake of argument, the majority's failure to allow a hearing on the issues is fatal under Section 309(e). The statute leaves no room for doubt. Although the majority have cited several cases for the proposition that no hearing is required if no material fact is in issue, the cases all involve petitions against applications which were *granted*. *United States v. FCC*, Dkt. No. 77-1249 (D.C. Cir., March 7, 1980); *Columbus Broadcasting Coalition v. FCC*, 505 F. 2d 320 (D.C. Cir. 1974); *Marsh v. FCC*, 436 F. 2d 132 (D.C. Cir. 1970); *Harbenito Broadcasting Co. v. FCC*, 218 F. 2d 28 (D.C. Cir. 1954). The cases properly interpret Section 309(e) of the Communications Act, but they are not relevant to the hearing which Section 309(e) mandates before the Commission can *deny* an application that does not require a waiver of a rule of general applicability. *See Western Michigan Telecasters, Inc. v. FCC*, 396 F. 2d 688 (D.C. Cir. 1968). Even *Joe L. Smith*, 1 FCC 2d 666 (1965), is distinguishable because it dealt with an application to renew a license for a station the applicant had not operated for several years, and the Commission granted the requested opportunity to submit a plan for future operation.

The only opportunities RKO has had to address those matters it may have guessed would be decisionally significant have been the pleadings with which it has sparred with its adversaries and the proffer allowed by the Commission. The proffer, however, is not even clearly a part of the record although the majority have referenced some parts of it. As described in paragraph 43 of the majority decision, it deals with evidence RKO would introduce "if given the opportunity."

I do not believe the statute is satisfied by asking parties to discuss in a proffer what they might litigate if the applicant had a hearing on potentially disqualifying issues. RKO apparently thinks it has evidence to offer on whichever additional issues the Commission might designate. In addition, on the basis of this decision, matters such as the credibility of Thomas O'Neil clearly are relevant. Before deciding the issues, the majority should have let them be tested in the crucible of an evidentiary hearing. The consequences to the applicant in this case are too significant to use this case as a test case for deviations from the statutorily prescribed procedures.

In my opinion, RKO should have been given a comparative demerit for the trade regulations program even though that program ended years ago. It should not have been absolutely disqualified on the basis of the records in this and the KHJ-TV hearings or on the basis of the majority's assumptions about what the record might be on issues not tried in the crucible of an evidentiary hearing. I am dissenting because I believe that the majority's decision exaggerates a nexus between General Tire's non-broadcast activities and RKO that gives non-broadcast activities too important a role in the decision, because RKO has not been allowed to fully defend itself, and because the Commission has changed its opinion about the significance of RKO's past trade relations involvement without an explanation. I am also dissenting because this procedurally defective decision may lead to an unjustified mass murder of all of RKO's parts. RKO hasn't been great in all respects, but it hasn't been as bad a broadcaster as the majority's opinion says it has.

DISSENTING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

(Addendum)

IN RE: RKO GENERAL, INC. (WNAC-TV), BOSTON, MASSACHUSETTS COMPARATIVE RENEWAL PROCEEDING (Dos. 18759-61)

The Commission majority by a 4-3 decision has determined that RKO General is not qualified to remain a broadcast licensee. This example of gross bureaucratic overkill represents the most harsh and unwarranted punishment in the history of communications.

This decision immediately affects RKO's television stations in Boston, New York and Los Angeles. The decision may also affect its other television station in Memphis, as well as its twelve radio stations throughout the country. The decision, even though subject to appeal, has already adversely affected some 45,000 innocent stockholders. The stock sold off 4¼ points, about 19%, with initial loss in value of approximately 95 million dollars the day after the decision was announced. And the decision, premised on inferences, will further levy a sanction involving several hundred millions of dollars. Not only does the punishment not fit the crime, the conclusions do not fit the record.

In order to find RKO unqualified to remain a licensee the majority has concocted a tenuous nexus beteween RKO and its parent company, General Tire and Rubber Company. The web of guilt by association is spun from a paucity of factual evidence and a plethora of inferences. The reversal of the Administrative Law Judge's decision is based on unproven charges and unsupported staff conclusions.

The majority has determined that RKO cannot be trusted to serve the public interest as a broadcast licensee. In order to make such determination there must be a nexus between the misconduct perceived by the FCC majority and anticipated future broadcast operations. Yet, such a requisite nexus is obviated in this case by specific legal restrictions, i.e., the Justice Department's trade relations consent decree and the SEC consent decree. Further, the single overlapping officer of GTR and RKO, Thomas F. O'Neil, has stated on the record that he intends to resign his positions as a director and Chairman of the Board of GTR upon a determination by the Commission that RKO is qualified to remain a broadcast licensee. In the face of these factors, I fail to see any evidence of record—or even an inference, for that matter—that RKO's future conduct as a broadcast licensee would not be in the public interest.

The Commission gave RKO the opportunity to submit mitigating evidence in response to the Report of the Special Review Committee of the GTR Board of Directors. The only matter raised in the Report relating to broadcasting was the trade and barter transactions of RKO. The Report concluded that RKO's policy was to utilize barter consideration properly in the conduct of its business. No material violations of this policy were found. The Report did find incomplete and unreliable documentation and record keeping with respect to accounting and reporting of barter transactions. In mitigation, RKO has shown that investigations conducted since the Report have produced much more copious documentation of the disposition of barter considerations than was initially obtained, and that an ongoing IRS audit has indicated that its audit did not involve fraud. Thus, RKO's submissions have reasonably satisfied the questions raised in the Report with respect to it.

The majority infers misrepresentations to the Commission by virtue of RKO's filing of financial reports (FCC Form 324) which did not include an accurate total value of trade-out and barter transactions. RKO has since supplied a detailed description of barter and trade transactions, company policy in recordation of the transactions, the reasons for excluding its memorandum method of accounting from financial reports other than those submitted to FCC, and emphasized the continuing concern that such records be accurately compiled and reflected for FCC reporting purposes. John B. Fitzgerald, controller for RKO, stated in his affidavit that, as to the alleged inaccuracies on the 324 Reports ". . . I had no knowledge that any errors existed at the time the reports were certified by me as being true and correct to the best of my knowledge, information and belief." Mr. Fitzgerald indicates his personal knowledge of errors in the barter and trade estimates reported to the Commission came as a result of both the Special Review Committee's investigation and his subsequent request for each RKO station to review its 324 reports to determine whether there had in fact been errors. In RKO's detailed showing with respect to the barter and trade practices, I find a wealth of material indicating good faith efforts and certainly *no intent* to file inaccurate or misleading financial information with respect to any RKO station. At most, there was a failure by omission, not commission.

Contrary to the conclusion of the majority, I do not believe the record establishes that the questioned activities of GTR in any way influenced the conduct of RKO as a broadcast licensee. And while this Commission may consider alleged misconduct attributable to a broadcast licensee's parent corporation, the end result in this case is that investigation by the appropriate federal authorities of the overseas activities as well as domestic political contributions of GTR or its subsidiaries resulted in consent decrees with *no judicial finding of guilt*. Further, the *activities investigated did not affect the broadcast performance of RKO General, nor were the audiences of the RKO stations in any way defrauded, deceived or poorly served.*

RKO broadcast operations are virtually autonomous. Admittedly, GTR has *de jure* control of RKO; however, by long established policy the GTR Board has placed *de facto* control of RKO broadcast-related operations and other business activities in the RKO Board of Directors. The Chairman of the Board of RKO, T. F. O'Neil, has for 18 years been the only interlocking director between RKO and its parent, and there have been no other overlapping officers or other employees between GTR and RKO. The record reflects that T. F. O'Neil has played only a limited role in the affairs of GTR, and that he was in no way involved in the questioned activities of GTR and its other subsdiaries. Mr. O'Neil has stated that he did not even know of such questionable matters at the time of their occurrence but learned of them only as a result of subsequent reports. The record does not reflect to the contrary nor has Mr. O'Neil's affidavit been controverted, and the majority has no basis on which to believe otherwise except as a matter of speculation. I find it difficult to establish a nexus between RKO and GTR based on such tenuous inferences.

In order to bulwark its strained conclusion as to the nexus between GTR and RKO, the majority reaches back to matters arising nearly 20 years ago. The Department of Justice filed a civil complaint against General Tire and RKO General in 1967, charging those companies with engaging in anti-competitive practices. The complaint alleged that General Tire and its subsidiaries—including RKO—had engaged in reciprocal trade dealings from at least 1961 to 1967 and that those activities violated the Sherman Antitrust Act. It is interesting to note that the Department's complaint was apparently the *first case* dealing with the issue of whether reciprocal trade dealings, standing alone, violated the antitrust laws. *RKO General, Inc. (KHJ-TV)*, 8 FCC 2d 632, 633 n. 4 (Rev. Bd. 1967). The civil suit initiated by the Justice Department was terminated in 1970 by virtue of a court-approved consent decree. There was *no judicial finding of guilt*. The FCC Administrative Law Judge noted that all phases of reciprocal dealings allegedly engaged in by General Tire and subsidiaries were explored in the Boston proceeding. In assessing the record, the ALJ considered the following factors: (1) the relevant legal and economic concepts were in a state of flux during the time covered by the record here involved; (2) neither responsible public officials nor the courts had given any definite rulings of the applicability of the antitrust statutes; and (3) there was no certainty at the time of their occurrence that General Tire's trade relations practices were improper. Accordingly, the ALJ concluded there was no present basis for charging General Tire or its subsidiaries with *knowing* and *willful* misconduct and, hence, no basis either to disqualify or to assess a comparative demerit against RKO.

By virtue of the consent decree GTR and its subsidiaries were precluded throughout the 1970's from those reciprocal trade practices which might be questionable. And if an inference is to be drawn, certainly the logical conclusion is that GTR and its subsidiaries—including RKO—will refrain from questionable trade practices in the future. The door closed on this matter in 1970. Yet the majority seizes upon the alleged misconduct—which I emphasize, was not judicially determined to be improper or illegal—and draws adverse inferences from this isolated and remote period in time. Guilty once—guilty forever? Guilty? Of what?

The majority further attacks the character of RKO on the dubious grounds of "lack of candor." This conclusion is premised on the failure of RKO to advise the Commission of the issuance in 1976 of a formal order of investigation by the Securities and Exchange Commission. In my opinion, the question was not *whether* RKO should report the fact of the SEC investigation, but rather *when*. I do not necessarily fault RKO for employing a policy of "minimal disclosure" in light of the adversarial interests at that time. I do not believe that the SEC *investigation* was a "formal proceeding" from which there stemmed the obligation under Section 1.65 of the Commission's rules to make full disclosure.

The majority likewise makes much of RKO's "lack of candor" in filing of its financial reports (Form 324) which did not accurately reflect barter and trade transaction totals. As I have pointed out, this filing was made in good faith and the subsequent determination that the barter and trade totals were not complete does not automatically create a lack of candor.

I place great weight on the findings and conclusions of the ALJ who heard this case and was intimately familiar with the totality of details. And, interestingly, his conclusion that RKO was qualified to remain a broadcast licensee is supported by the Commission's Broadcast Bureau which likewise concluded that RKO's renewal of license for WNAC-TV may be granted. And, finally, three Commissioners have concluded also that RKO is qualified to remain a broadcast licensee. In short, the case is not as adversely conclusive as the majority seeks to make it appear.

From a practical standpoint it seems to me that future broadcast performance of RKO will continue to be in the public interest, augmented by new procedures designed to shore up minor deficiencies in its past operations. Upon grant of the license renewal for WNAC-TV, T. F. O'Neil would resign his positions as a director and Chairman of the Board of GTR, thus obviating even the hint of corporate nexus. Most importantly, RKO has committed the sale of WNAC-TV to New England Television Corporation upon the grant of license renewal. This would promote the Commission's goal of increasing minority ownership of broadcast stations, since eight of the proposed transferee shareholders are black citizens with a 12.9% ownership interest, four of whom would be directors. Certainly this is a much more desirable and justifiable resolution of the matter than the multi-million dollar penalty which the majority seeks to inflict.

To contrast the moralistic posturing of the majority with the conclusions of the Special Review Committee, I quote from the final paragraph of the Report's conclusion:

> "Finally, the conduct which has been criticized must be viewed in context. General Tire is a large company. Its Annual Report for 1976 shows assets of more than $1.5 billion, sales of more than $2.1 billion, and net income of more than $100 million. The Company has prospered under its present management and thousands of sound, proper actions must have been taken for every questionable or improper one. The Committee believes that the final judgment of permanent injunction entered May 10, 1976 with the Company's consent together with appropriate implementation of the recommendation should result in needed changes."

In the face of this statement the majority continues to insist that the "sins" of GTR, although years old, demand expiation and that GTR's subsidiary, RKO General, will be held liable for such wrongdoing. I fail to understand how the majority can attribute once-removed wrongdoings to future broadcast performance of RKO General.

Today's action is bureaucratic overkill at its worst. It is significant to note that the two major offenses of which GTR and RKO have been accused, the improprieties of GTR and reciprocal trade practices, have been disposed of by consent decrees. Yet the majority has imposed an unbelievably punitive sanction by determining that RKO is no longer qualified to hold broadcast licenses for its television stations in Boston, New York and Los Angeles. The majority will undoubtedly insure that this finding of "disqualification" will extent eventually to the other thirteen broadcast licenses of RKO when they are subject to renewal, even though it "seeks comments" on the matter.

Even assuming, *arguendo*, a degree of misconduct on the part of RKO (and I tend to categorize any such misconduct as errors in judgment), the Commission has repeatedly stated it will consider countervailing factors to overcome or eliminate doubt concerning the effect of the conduct on the applicant's future public interest performance as a broadcast licensee. Yet the majority has given little weight to balancing RKO's excellent record as a broadcaster for over 35 years. RKO is a veritable pioneer in the broadcasting industry and, as such, evidenced its willingness to accept the financial losses involved in such pioneering in order to advance the state of the art. It constructed and hs continuously operated FM broadcast stations from the earliest days of FM broadcasting—the financial losses of such early operations are well known. RKO pioneered in the operation of subscription television at substantial financial costs and made the knowledge and experience thus achieved available to the Commission. RKO has been active in the field of radio from a technical standpoint and has been responsible for many technical developments. RKO has contributed to educational broadcasting through financial gifts and the making of equipment and program material available to educational stations. It has contributed to the development of new program sources for television. Such contributions certainly enhance the qualifications of RKO, not only as an experienced broadcast licensee but as a contributor to the public interest in broadcast communication. These factors, coupled with RKO's long-established and consistent autonomy, and the court's continuing jurisdiction to enforce the injunctive provisions of the consent judgment, support a reasoned judgment that the record before this Commission is sufficient for a finding that RKO is a qualified broadcast licensee.

Finally, I believe a strong, valid argument can be made that the same standard of proof should have been applied as in a revocation proceeding. It is most significant that the Commission did not decide the case on comparative issues, but solely upon the character qualifications of the licensee. This case was initially presented as a comparative renewal case, but the principal issue became the fundamental qualifications of the licensee to remain in the broadcasting business.

The majority has lost sight of the comparative aspects as between the contending parties. Instead, they have focused on the conduct of RKO generally in its trade practices of 20 years ago, and on the corporate nexus between GTR and RKO—not RKO the licensee of WNAC-TV applying for renewal, but RKO General, licensee of 16 broadcast stations and subsidiary of GTR. All but ignored are the comparative aspects of RKO as a licensee of WNAC-TV, and the focus is on its general qualifications to be a broadcast licensee. This is tantamount to revocation of the privilege to continue to do business. The cost of such revocation will amount to several hundred million dollars in broadcast properties now licensed to RKO General. The cost of such revocation includes the unwarranted drop in value of pertinent stock, to the dismay of innocent stockholders. A further cost of revocation of RKO's privilege to engage in radio and television broadcasting will be unmeasured adverse impact on the lives of hundreds of people now employed in RKO studio and television stations —loss of jobs, transfers, embarrassment, bewilderment, resentment. Those who supply software and hardware to the RKO broadcast operations face uncertainty of this market in future dealings, with the prospect of curtailment or cancellation of business relations. And the revocation of RKO's privilege of conducting its 35-year broadcast business will impact deleteriously on hundreds of thousands of RKO station listeners and viewers who rely on the service that the stations provide to them and their communities, not in hyper-technical punishment of the corporate licensee of the stations.

My point is that the decision of the majority is in essence a revocation action, not a comparative hearing evaluation and award. The majority's decision has in fact *revoked* RKO's privilege to continue to do business as a broadcast licensee.

I question the substantiality of the evidence relied upon by the majority in arriving at such a far-reaching decision. Preponderance of the evidence does not appear to be the appropriate standard applicable in a case of this magnitude.

I suggest that a "clear and convincing" standard of proof should be required before we deny RKO the privilege of continuing the broadcast business it has built over the years. I find support for this view in a recent case involving revocation of a broadcast license, wherein the court held that for the FCC to revoke a broadcast license, a "preponderance of evidence" is not enough. The evidence must be "clear and convincing." *Sea Island Broadcasting Corporation of S.C. v. FCC*, Case No. 76-1735 (January 14, 1980). The Commission there unsuccessfully argued that loss of a broadcast license does not amount to a potential deprivation of a livelihood, as in a cited precedent, since the former licensee may still obtain a job in the broadcasting industry and the revocation of one license "would not necessarily result in the loss of any other broadcasting station's license held by such a licensee."

The court was not persuaded by this argument, stating ". . . The broadcaster who loses his license may get other jobs in the industry, but he has certainly lost a business."

The court held in the Sea Island case that revocation of an FCC license must be governed at the agency level by a "clear and convincing" standard of proof.

Although the RKO case does not technically involve a revocation proceeding, the actual character and effect of this case is one of multiple license revocations. Most assuredly RKO, by the majority's dictates, "has lost a business"—sixteen businesses could be the ultimate loss.

The appropriate standard of proof in a case of this magnitude should have been that of "clear and convincing" evidence. The very nature of the unprecedented sanction, the harshest in the history of the FCC, demands most substantial grounds in justification.

The record could not possibly establish "clear and convincing" evidence. In fact, I do not believe the record can even support the majority's conclusion based on a "preponderance of evidence." However, I remain convinced that the most stringent standard of proof must be utilized before we strip three and possibly sixteen broadcast licenses from a licensee with a 35-year broadcasting record of development, investment, innovation and continued meritorious service in the public interest.

The incredibly harsh findings that RKO General lacks the requisite qualifications to remain a broadcast licensee indicates a mindset that equates bigness with badness. Under these circumstances, all large, multi-faceted corporations who own broadcast properties should be on notice that all of their dealings must be not only legal but above any possible reproach. Such a rigid standard with no allowance for human error is virtually unattainable, a fact which could make large corporate owners—and their stockholders—an endangered species.

I dissent—emphatically.

DISSENTING COMMENT BY COMMISSIONER ABBOTT WASHBURN

RE: RKO GENERAL, INC. (WNAC-TV)

In an unprecedented and extreme action the majority voted to find RKO General, a pioneer in the broadcasting industry and owner of 16 broadcast stations, unqualified to be a licensee—largely because of the non-broadcasting deeds of its parent corporation, General Tire. By so doing, it departs from a long history of limited inquiry into an applicant's non-broadcasting conduct to measure the "ability to operate a broadcast station in the public interest."[1] The foreign payments, secret bank accounts, etc. of a corporate parent of a broadcast licensee bear little or no reasonable relationship either to the service rendered by the licensee's stations or to the Commission's regulatory function. In this case these matters were properly dealt with by the Justice Department and the Securities & Exchange Commission.

Notwithstanding the tenuous nature of the connection between General Tire's misdeeds and RKO's broadcast service to the public, the majority relies heavily on that connection to place all of the licensee's stations in jeopardy. I find it hard to see how the parent's wrong-doing overseas, for example, has anything to do with the public service rendered by any of its 16 stations, e.g., WGMS, the good music station here in the District of Columbia.

This is an unfortunate result. It derails a very good solution to the long contested ownership of WNAC-TV (Channel 7) in Boston, where agreement had been reached for a fine group of local citizens, New England Television, to take over the station and upgrade its programming. Sadly, too, this action of the Commission does little but assure many more years of litigation in a proceeding that has already dragged on for 11 years.

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[1] *Uniform Policy as to violations by an applicant of laws of the U.S.*, 42 FCC 2d 399, 400 (1951).

In its vote today, the majority has not objectively assessed the qualifications of RKO General to be a licensee. Rather it has focused on the parent organization and made a moral judgment about corporate businesss standards. In my view, the proper result would have been for the Commission to affirm the Administrative Law Judge's Initial Decision, which found the licensee qualified for renewal.

Renewal of License Denied

Application for renewal of license denied for lack of candor, concealment of decisionally significant information, and participation in anti-competitive practices, as found in companion Commission proceeding involving same licensee. DO. 16679

FCC 80-329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 16679

File No. BRCT-58

In Re Applications of

RKO GENERAL, INC. (KHJ-TV) Los Angeles, California
For Renewal of Broadcast License

Docket No. 16680

File No. BPCT-3655

FIDELITY TELEVISION, INC. Norwalk, California
For Construction Permit for New Television
Broadcast Station

ORDER

(Adopted: June 4, 1980; Released: June 6, 1980)

BY THE COMMISSION: COMMISSIONERS LEE, QUELLO AND WASHBURN

DISSENTING AND ISSUING STATEMENTS.

1. This comparative proceeding was first designated for hearing on June 8, 1966.[1] Ultimately, the Commission granted KHJ-TV's renewal application subject to the out-

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[1] *RKO General, Inc. (KHJ-TV)* FCC 66-503.

come of the comparative proceeding involving Station WNAC-TV, Boston, Massachusetts, which is also licensed to RKO General. (Docket Nos. 18759-61).[2] In affirming the Commission's decision, the Court of Appeals similarly conditioned renewal on the final resolution of the Boston proceeding.[3]

2. On June 4, 1980, the Commission reached a final determination in the Boston proceeding and concluded that RKO General, Inc. lacks the requisite qualifications to remain the licensee of WNAC-TV. In light of this determination and the interrelationship between the Los Angeles and Boston proceedings, we are constrained to conclude that RKO also lacks the requisite qualifications to remain the licensee of KHJ-TV.

3. In light of the age of this proceeding,[4] Fidelity is directed to identify those outstanding motions which can be dismissed as moot because of RKO's disqualification and those motions which still must de disposed of before this proceeding can be terminated. Fidelity is also directed to address the question of whether its construction permit can now be granted. In this regard, it would also be appropriate for Fidelity to address the question of whether additional hearings will be necessary to dispose of all outstanding matters or whether the proceedings may be successfully terminated solely through the written submission of the parties.[5]

4. ACCORDINGLY, IT IS ORDERED, That within thirty (30) days from the date of the release of this order, Fidelity is DIRECTED TO SUBMIT pleadings consistent

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[2] *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123 (1973).

[3] *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[4] A detailed account of the early history of the KHJ-TV case can be found in *Fidelity Television, Inc. v. FCC*, 502 F.2d 443 (D.C. Cir. 1974).

[5] *Cf. Las Vegas Valley Broadcasting Co.*, 73 FCC 2d 216 (1979).

with the instructions set out in paragraph 3, *supra*, with RKO General, Inc. and the Broadcast Bureau afforded the opportunity to file reply comments within twenty (20) days thereafter.

5. IT IS FURTHER ORDERED, That the application of RKO General, Inc. for renewal of the license (File No. BRCT-58) for Station KHJ-TV, Los Angeles, California, IS DENIED; HOWEVER, RKO General, Inc. IS AUTHORIZED to continue to operate Station KHJ-TV until 12:01 a.m., July 7, 1980, to enable the licensee to conclude the station's affairs, provided, that if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station KHJ-TV until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*

* Dissenting statements of Commissioners Lee, Quello and Washburn not included herein. See RKO General, Inc. (WNAC-TV) FCC 80-331 (77 2d).

Renewal of License Denied

> Application for renewal of license denied for lack of candor, concealment of decisionally significant information, and participation in anti-competitive practices, as found in companion Commission proceeding involving same licensee. DO. 19991

FCC 80-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 19991

File No. BRCT-71

In Re Applications of
RKO GENERAL, INC. (WOR-TV) New York, New York
For Renewal of Broadcast License

Docket No. 19992

File No. BPCT-4527

MULTI-STATE COMMUNICATIONS, INC.
New York, New York

For Construction Permit for New Television
Broadcast Station

ORDER

(Adopted: June 4, 1980; Released: June 6, 1980)

BY THE COMMISSION: COMMISSIONERS LEE, QUELLO AND WASHBURN

DISSENTING AND ISSUING STATEMENTS.

1. This proceeding was first designated for hearing on April 10, 1974.[1] At that time the Commission specified that resolution of issues designated against RKO in the

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[1] *RKO General, Inc. (WOR-TV)*, 46 FCC 2d 246.

Boston, Massachusetts, comparative proceeding (Docket Nos. 18759-61), involving Station WNAC-TV, an RKO licensed station, would be *res judicata* as to RKO in the New York proceeding. Subsequently, after conducting a bifurcated hearing, the Administrative Law Judge found Multi-State financially unqualified.[2] In affirming, the Commission directed that the hearing proceed in order to resolve certain issues pending against RKO.[3] Thereafter, the Administrative Law Judge found RKO qualified and recommended grant of the renewal application for Station WOR-TV, again subject to the outcome of the Commission's action in the Boston proceeding.[4] The Commission in turn adopted the recommendation of the Administrative Law Judge and granted the license renewal for station WOR-TV, subject to the outcome of the Boston proceeding.[5]

2. On June 4, 1980, the Commission reached a final determination in the Boston proceeding, concluding that RKO General, Inc. lacks the requisite Qualifications to remain the licensee of Station WNAC-TV. In light of this determination and the interrelationship between the New York and Boston proceedings, we are constrained to conclude that RKO General also lacks the requisite qualifications to remain the licensee of WOR-TV.

3. To expedite resolution of the instant proceeding Multi-State is directed to advise the Commission which outstanding petitions can be dismissed as moot because of

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[2] *RKO General, Inc. (WOR-TV)*, 61 FCC 2d 1070 (1976).

[3] *RKO General, Inc. (WOR-TV)*, 61 FCC 2d 1062 (1976). The court reversed this determination and remanded the case to the Commission for further disposition. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

[4] *RKO General, Inc. (WOR-TV)*, FCC 76D-70, released January 4, 1977.

[5] *RKO General, Inc. (WOR-TV)*, 69 FCC 2d 461 (1978).

RKO's disqualification and which motions must still be disposed of before this proceeding can be terminated. Multi-State is further directed to address the question of whether its construction permit application can now be granted. In this regard, it would also be appropriate for Multi-State to address the question of whether additional hearings will be necessary to dispose of all outstanding matters or whether the proceedings may be successfully terminated solely through the written submissions of the parties.[6]

4. ACCORDINGLY, IT IS ORDERED, That within thirty (30) days from the release date of this order, Multi-State is DIRECTED TO SUBMIT pleadings consistent with the instructions set out in paragraph 3, *supra*, with RKO General, Inc. and the Broadcast Bureau afforded the opportunity to file reply comments within twenty (20) days thereafter.

5. IT IS FURTHER ORDERED, That the application of RKO General, Inc. for renewal of the license (File No. BRCT-71) for Station WOR-TV, New York, New York, IS DENIED; HOWEVER, RKO General, Inc. IS AUTHORIZED to continue to operate Station WOR-TV until 12:01 a.m., July 7, 1980, to enable the licensee to conclude the station's affairs, provided, that if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station WOR-TV until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*

* Dissenting statements of Commissioners Lee, Quello and Washburn not included herein. See RKO General, Inc. (WNAC-TV) FCC 80-331 (77 2d).

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[6] *Cf. Las Vegas Valley Broadcasting Co.,* 73 FCC 2d 216 (1979).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1696

RKO GENERAL, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MULTI-STATE COMMUNICATIONS, INC.,
Intervenor

80-1697

RKO GENERAL, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

FIDELITY TELEVISION, INC.,
MULTI-STATE COMMUNICATIONS, INC.,
Intervenors

80-1698

RKO General, Inc.,
Appellant
v.

Federal Communications Commission,
Appellee

Fidelity Television, Inc.,
New England Television Corporation,
Dudley Station Corporation,
Multi-State Communications, Inc.,
Community Broadcasting of Boston, Inc.,
Intervenors

Appeals From Orders of the
Federal Communications Commission

Before: Tamm, Mikva and Edwards, Circuit Judges

JUDGMENT

These causes came on to be heard on the records on appeal from the Federal Communications Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the orders of the Federal Communications Commission on appeal herein are hereby affirmed in part, and these appeals, insofar as they pertain to the Los Angeles and New York City proceedings, are remanded to the Commission for further action, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Date: December 4, 1981

Opinion for the Court filed by Circuit Judge Mikva.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1696

RKO GENERAL, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MULTI-STATE COMMUNICATIONS, INC.,
Intervenor

and consolidated cases

Before: Tamm, Mikva and Edwards, Circuit Judges

ORDER

On consideration of the petitions for rehearing of RKO General, Inc., Fidelity Television, Inc., and Multi-State Communications, Inc., it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Filed Jan. 18, 1982]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1696

RKO GENERAL, INC.,
Appellant
v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MULTI-STATE COMMUNICATIONS, INC.,
Intervenor

and consolidated cases

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of RKO General, Inc., Fidelity Television, Inc., and Multi-State Communications, Inc., have been circulated to the full court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

[Filed Jan. 18, 1982]

Circuit Judges Wilkey and Wald did not participate in this order.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1928, 81-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

FIDELITY TELEVISION, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION,
RKO GENERAL, INC.,
COMMUNITY BROADCASTING OF BOSTON, INC.,
NEW ENGLAND TELEVISION CORPORATION,
THE DUDLEY STATION CORPORATION, AND
MULTI-STATE COMMUNICATIONS, INC.,
Respondents.

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION,
RKO GENERAL, INC.,
COMMUNITY BROADCASTING OF BOSTON, INC.,
NEW ENGLAND TELEVISION CORPORATION,
THE DUDLEY STATION CORPORATION, AND
FIDELITY TELEVISION, INC.,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

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May 19, 1982

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QUESTION PRESENTED

The court of appeals rejected two of the three asserted bases for the decision of respondent Federal Communications Commission (the "Commission" or "FCC") to disqualify respondent RKO General, Inc. ("RKO") as licensee of television station WNAC-TV, Boston, but affirmed the denial of license renewal for WNAC-TV on the single ground that RKO had displayed a lack of candor in the Boston proceeding.* The court remanded the FCC's termination of RKO licenses for television stations KHJ-TV, Los Angeles, and WOR-TV, New York City, on the grounds that the Commission had failed to articulate a rational basis for RKO's disqualification in the New York and Los Angeles proceedings, and that further consideration of those proceedings was needed in light of the drastic alteration worked by the court in the bases for disqualification asserted by the agency.

The question presented by these cases is whether the court of appeals exceeded the bounds of judicial review by remanding the New York and Los Angeles proceedings for further consideration by the FCC.

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* The parent company of RKO is The General Tire & Rubber Company ("General Tire"). Frontier Airlines, Inc., is the only partially-owned subsidiary of RKO. For purposes of Rule 28.1 of the Rules of this Court, we construe the term "affiliate" to exclude other subsidiaries of RKO's parent company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1928

FIDELITY TELEVISION, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION,
RKO GENERAL, INC.,
COMMUNITY BROADCASTING OF BOSTON, INC.,
NEW ENGLAND TELEVISION CORPORATION,
THE DUDLEY STATION CORPORATION, AND
MULTI-STATE COMMUNICATIONS, INC.,
Respondents.

No. 81-1929

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION,
RKO GENERAL, INC.,
COMMUNITY BROADCASTING OF BOSTON, INC.,
NEW ENGLAND TELEVISION CORPORATION,
THE DUDLEY STATION CORPORATION, AND
FIDELITY TELEVISION, INC.,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. Apps. A)[1] is reported at 670 F.2d 215. The Decision and Orders of the Commission (Pet. Apps. B) are reported at 78 F.C.C.2d 1, 355 and 357.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief.

STATEMENT[2]

In 1966, RKO's license renewal application for station KHJ-TV, Los Angeles (which RKO has operated since 1951)[3] was designated for comparative hearing with the competing application of petitioner Fidelity Television, Inc. ("Fidelity").[4] In 1969, RKO's license renewal application for WNAC-TV, Boston, was similarly designated for comparative hearing with two mutually exclusive applications. One of the questions in the KHJ-TV proceeding related to alleged anticompetitive reciprocal dealings by RKO. The Commission designated a new issue as to reciprocal dealings in the WNAC-TV proceeding and authorized both official notice of the KHJ-TV record and the taking of new evidence.[5]

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[1] Citations to "Pet. Apps." refer to the appendices to the petitions for writ of certiorari filed by petitioners Fidelity Television, Inc. and Multi-State Communications, Inc.

[2] This Statement is limited to a discussion of the facts relevant to the petitions now before the Court and does not attempt a complete description of the complex agency proceedings below.

[3] *See RKO General, Inc.* (*KHJ-TV*) (Initial Decision), 44 F.C.C.2d 149, 156-57, ¶ 38 (1969), J.A. 4, 11-12. Citations to "J.A." refer to the Joint Appendix in the court of appeals.

[4] A detailed history of the Los Angeles renewal proceeding is provided in *Fidelity Television, Inc. v. FCC*, 502 F.2d 443 (D.C. Cir. 1974).

[5] *RKO General, Inc.* (*WNAC-TV*), 20 F.C.C.2d 846, 847-48 (1969), J.A. 85-87.

In 1973, the Commission resolved the KHJ-TV proceeding in favor of RKO, but made its decision subject to the resolution in the WNAC-TV proceeding of the issue of reciprocal dealings and a related issue as to the candor of RKO witnesses on that subject in the KHJ-TV proceeding.[6] In affirming that Commission decision in 1975, the court of appeals recognized the limited nature of the condition placed upon RKO's Los Angeles renewal.[7]

The last of the three proceedings reviewed by the court below involves RKO's New York City television station, WOR-TV (which RKO has operated since 1952).[8] In 1974, the Commission designated RKO's application for renewal of the WOR-TV license for a comparative hearing with the mutually exclusive application of petitioner Multi-State Communications, Inc. ("Multi-State").[9] The Commission noted the three specific issues as to RKO's qualifications then being considered in the WNAC-TV proceeding and designated them for hearing in the

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[6] *RKO General, Inc. (KHJ-TV)*, 44 F.C.C.2d 123 (1973), J.A. 96-111. Fidelity had previously been made a party to the WNAC-TV proceeding, with its participation limited to the issue of reciprocal dealings and the related candor question. *RKO General, Inc. (WNAC-TV and KHJ-TV)*, 31 F.C.C.2d 70, 74 (1971), J.A. 89, 93; *see also Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 446 (D.C. Cir. 1974); Pet. Apps. A at 41a-42a.

[7] *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 693, 697, 698 n.26 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). In previously refusing to dismiss the appeal from the Commission's decision as premature, the court recognized the same point. *Fidelity Television, Inc. v. FCC, supra*, 502 F.2d at 449, 452.

[8] *See* Voluntary Assignment of License Application, No. BALCT-17 (granted Jan. 17, 1952).

[9] *RKO General, Inc. (WOR-TV)*, 46 F.C.C.2d 246 (1974), J.A. 122. For a history of litigation concerning the Multi-State application, see *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied sub nom. RKO General, Inc. v. Multi-State Communications, Inc.*, 440 U.S. 959 (1979).

WOR-TV proceeding.[10] The Commission stated that RKO was bound by the record developed in the WNAC-TV proceeding and that resolution of the designated disqualifying issues in that proceeding would therefore be *res judicata* as to RKO.[11]

Following these Commission orders fixing the interrelationship of the three proceedings, an Administrative Law Judge issued an Initial Decision in the WNAC-TV proceeding in favor of RKO on all counts.[12] While administrative appeals from the Initial Decision were pending before the Commission, competing applicants for the WNAC-TV license sought to have the Commission consider other disqualifying issues—issues with respect to (1) alleged misconduct by RKO's corporate parent, General Tire, in various nonbroadcast fields; (2) alleged misrepresentations in FCC financial reports filed by RKO; and (3) alleged lack of candor by RKO in dealings with the Commission. *See* Pet. Apps. B at 64a-66a, 72a-74a.

The Commission Decision and Orders

In June 1980, following several rounds of pleadings and argument, the FCC released its Decision and Orders below. The WNAC-TV decision[13] found RKO unqualified to remain the licensee of its Boston station on the basis of (1) reciprocal trade practices by RKO and General

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[10] *RKO General, Inc.* (*WOR-TV*), *supra*, 46 F.C.C.2d at 248-49, J.A. 124-25. These included, in addition to the issues as to reciprocal trade dealings and candor in testimony on that subject noted above (*see supra* note 6 and accompanying text), an issue as to alleged violations of sponsorship identification requirements by RKO with respect to one program series. 46 F.C.C.2d at 249, J.A. 125.

[11] *Id.*

[12] *RKO General, Inc.* (*WNAC-TV*) (Initial Decision), 78 F.C.C.2d 147 (1974), J.A. 128-333.

[13] *RKO General, Inc.* (*WNAC-TV*), 78 F.C.C.2d 1 (1980), Pet. Apps. B at 46a-276a.

Tire during the 1960s (Pet. Apps. B ¶¶ 58-92, at 90a-119a); (2) misrepresentations in financial reports filed by RKO with the FCC (*id.* ¶¶ 136-87, at 173a-186a); and (3) lack of candor by RKO during the course of the Boston proceeding (*id.* ¶¶ 196-218, at 192a-210a). The Commission also held that activities by General Tire in nonbroadcast fields, while "not disqualifying by themselves" (*id.* ¶ 140, at 159a), weighed heavily against RKO's licensee qualifications. *Id.* ¶¶ 93-140, at 119a-159a; *see also* Pet. Apps. A at 12a.[14]

In the companion Orders, the Commission stated without further explanation that, because of the relationships among the three proceedings, disqualification of RKO in Boston "constrained" it to disqualify RKO in the other pending renewal proceedings involving RKO's Los Angeles and New York stations.[15] The FCC thus made no independent assessment of RKO's qualifications as a licensee of those stations in light of the Boston findings.

Subsequently, the Commission instituted a proceeding to consider the effect of its Boston decision on RKO's qualifications to hold licenses for its thirteen remaining broadcast stations.[16] The Commission's order in that proceeding states that the Boston decision was not intended to and did not resolve RKO's qualifications to hold those remaining licenses and provides that RKO will be permitted "to introduce evidence on meritorious programming with respect to the 13 other stations and any other mitigating evidence with respect to the remaining licenses." [17]

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[14] At the same time, the Commission left undisturbed the finding of the Administrative Law Judge that RKO had been candid in testifying about the reciprocal trade practices in the earlier KHJ-TV proceeding, Pet. Apps. B at 253a (Ruling on Community Exception No. 157), and did not invoke the sponsorship identification issue as a basis for disqualification, Pet. Apps. B at 189a n.385, 255a (Ruling on Community Exception No. 198).

[15] *RKO General, Inc.* (*KHJ-TV*), 78 F.C.C.2d 355, 355 (1980), Pet. Apps. B at 277a, 278a; *RKO General, Inc.* (*WOR-TV*), 78 F.C.C.2d 357, 358 (1980), Pet. Apps. B at 280a, 281a.

[16] *RKO General, Inc.*, 82 F.C.C.2d 291 (1980), *appeal pending sub nom. New South Media Corp. v. FCC*, No. 80-2556 (D.C. Cir.).

The Decision of the Court of Appeals

The court of appeals rejected all but one of the grounds for the Commission's decision to disqualify RKO in Boston. The court rejected outright the FCC's rulings on reciprocal trade dealings in the early 1960s; it held that those rulings reflected "an ex post facto application of new standards to conduct that is long past." Pet. Apps. A at 44a; *see also id.* at 12a-18a.[18] And it overturned the FCC's findings as to RKO's financial reports, holding that under Section 309 of the Communications Act, 47 U.S.C. § 309, the Commission could not lawfully conclude that RKO officials had intentionally filed false reports without designating an issue and conducting a hearing. Pet. Apps. A at 11a-12a, 18a-21a, 44a-45a.[19]

In upholding the termination of RKO's Boston license, the court affirmed only the Commission's conclusion that RKO lacked candor during the course of the Boston proceeding. The court held that its affirmance in Boston rested on "a quite narrow ground that cannot automatically be applied to any other proceeding." Pet. Apps. A at 3a. The Commission was not justified in automatically extending the Boston disqualification to Los Angeles and New York City "simply because it happened to condition those proceedings on the Boston outcome." *Id.* at 41a. The latter proceedings had been conditioned solely on the resolution of specific, formally designated issues in Boston, none of which involved the only defect ultimately held by the court to be disqualifying in Boston. *Id.* at 41a-42a.

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[17] *Id.* at 318, *quoted in* Pet. Apps. A at 42a.

[18] The court also noted that "[a]lthough the FCC conditioned its first [KHJ-TV] decision on RKO's reciprocal dealings on the possibility that significant new evidence might be introduced in the subsequent WNAC proceeding, such evidence never appeared." Pet. Apps. A at 15a.

[19] With respect to General Tire's nonbroadcast misconduct, the court recognized that it had had "small practical significance in the FCC's decision to disqualify RKO." Pet. Apps. A at 23a.

The court found additional support for this view in the Commission's ruling as to RKO's thirteen other broadcast stations (the license renewals for which had also been conditioned on the Boston outcome), which expressly recognized that the Boston disqualification did not compel the disqualification of RKO everywhere. Pet. Apps. A at 42a.[20] In light of this ruling and the substantially altered basis for the Boston disqualification, the court concluded that it was appropriate to treat the New York and Los Angeles television stations in the same fashion as the other thirteen. *Id.*

Petitioners Fidelity and Multi-State filed petitions for rehearing and suggestions for rehearing *en banc*, taking issue with the court's remand of the Los Angeles and New York proceedings and essentially tracking the arguments now made in their petitions for certiorari. The petitions and suggestions were denied without opinion on January 18, 1982. Pet. Apps. D at 285a-286a.[21]

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[20] The court also noted other Commission precedent rejecting the automatic application of a disqualification decision at one station to an applicant's other stations. *See* Pet. Apps. A at 43a n.48 (citing *KFPW Broadcasting Co.*, 47 F.C.C.2d 1090, 1095-96 (1973)).

[21] Simultaneously, a petition for rehearing and suggestion for rehearing *en banc* filed by RKO were denied. Pet. Apps. D at 285a-286a. On April 19, 1982, this Court denied RKO's petition for writ of certiorari to review the decision as to the Boston station. 50 U.S.L.W. 3838 (No. 81-1545).

ARGUMENT

Review of these cases is not warranted. The decision of the court of appeals remanding the Los Angeles and New York proceedings presents none of the established grounds for the exercise of certiorari jurisdiction, and in any event is correct.

1. Insofar as the Los Angeles and New York proceedings are concerned, the court of appeals has not issued a decision in conflict with the decisions of this Court or of any other court of appeals, has not departed from the accepted and usual course of judicial proceedings, and has not decided any novel or important question of federal law. The court of appeals simply applied the settled principle that an agency must articulate a rational basis for its actions, and required further consideration of the Los Angeles and New York proceedings in light of the court's drastic alteration of the grounds for disqualification in Boston.

Petitioners' only effort to bring the case within any of the recognized grounds for certiorari rests on an assertion that the decision below is somehow contrary to this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).[22] The assertion is baseless.

In *Vermont Yankee*, the Court held that, except in rare circumstances, a reviewing court could not impose upon agencies in the conduct of rulemaking proceedings procedural requirements beyond those specified by Congress. 435 U.S. at 523-25, 548. Here, the court of appeals did not impose its own notion of proper procedure on the agency. It held that the agency's procedural orders in the three proceedings provided no substantive justification for the extension of the sanction imposed in Boston to the remaining two proceedings.[23] The need for such justification was particularly evident in light of the agency's determination in the proceeding as to RKO's remaining thirteen stations that the Boston decision did not compel RKO's disqualification everywhere.

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[22] Fidelity Petition ("Fid. Pet.") at (i), 8-9, 14; Multi-State Petition ("M-S Pet.") at 9. Petitioner Multi-State also erroneously asserts (M-S Pet. at 10-11, 13-14) that the decision below conflicts with other decisions of the same court of appeals. But no member of the court of appeals requested the taking of a vote on either Multi-State's or Fidelity's suggestion for rehearing *en banc*. Pet. App. D. at 286a. In any event, an intracircuit conflict provides no recognized basis for granting certiorari. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974). *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 275-77 (5th ed. 1978).

There is no reason to review this interlocutory order.[24] The court remanded for further assessment of RKO's qualifications in New York and Los Angeles in light of the limited ground for disqualification in Boston, leaving the Commission free to give the candor finding "whatever weight it considers appropriate." Pet Apps. A at 43a. There was no invasion of agency prerogatives.

2. In the aspects challenged by petitioners, the decision below is not merely unremarkable. It is plainly correct.

The court of appeals correctly recognized that the conditioning by the FCC of the Los Angeles and New York proceedings was limited to specific issues—the reciprocity issue, which has now been rejected as a basis for disqualification,[25] and the other designated issues in Boston, which were either resolved in favor of RKO or never found disqualifying. Pet. Apps. A at 41a-42a. As the court of appeals stated, "[t]he FCC could not have known, when it conditioned either of these proceedings as it did, that the Boston outcome would turn on a lack of candor issue that had not even been designated in the Boston proceeding." *Id.* at 42a.

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[23] As Fidelity notes (Fid. Pet. at 9-10), "[t]he FCC never intended [its] procedural decision to have any bearing on the ultimate *substantive* resolution of RKO's character qualifications." (Emphasis in original.)

[24] *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-58 (1916); *American Const. Co. v. Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893). Petitioner Fidelity erroneously suggests (Fid. Pet. at 14) that this is a case, like *Vermont Yankee*, in which review of an interlocutory order is warranted because of the great significance and potential wide applicability of the lower court decision. But the application of settled principles to the particular facts of this case can create no such precedent.

Fidelity argues (Fid. Pet. at 11-12) that the court of appeals "has made the substantive outcome of the case turn entirely on procedural happenstance, which was just what the FCC had not intended." This argument stands the decision below on its head. The court has remanded the Los Angeles and New York proceedings precisely to ensure that the substantive outcome of those cases turns, not on procedural happenstance, but on a proper exercise of agency judgment.[26] Indeed, any other outcome would have been squarely inconsistent with the Commission's own decision with respect to RKO's thirteen other broadcast stations. *See* pp. 5-6, 7 *supra.*

A remand for further consideration was particularly appropriate here in light of the drastic alteration in the grounds for the Boston disqualification that had been worked by the court's decision. The court had rejected most of the grounds for the Boston disqualification—including the principal ground that tied the three cases together (reciprocal trade dealings).[27] The analogy to contempt in the presence of a judge, on the basis of which the court of appeals had affirmed the FCC's finding without hearing that RKO had displayed a lack of candor in the Boston proceeding, suggested no reason for automatic expansion of the sanction to encompass all three stations.[28] And the agency had declined to hold RKO automatically disqualified to hold any license whatever on the basis of all the grounds asserted in the Boston decision (including those rejected by the court). The court was properly unable to conclude that the agency would necessarily find the single remaining ground for disqualification sufficient to warrant so draconian a result. There is no reason for this Court to foreclose the exercise of agency discretion for which the court of appeals has provided.

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[25] Neither petitioner challenges the court's holding with respect to the reciprocal trade dealings issue.

[26] Contrary to petitioner Fidelity's suggestion (Fid. Pet. at 12), there is particular reason for further consideration of the Los Angeles proceeding. As the court noted, the Los Angeles license renewal was granted by the FCC in 1973 subject only to future findings as to reciprocal dealings and, because the court had rejected reciprocal dealings as a basis for disqualification of RKO, "the Los Angeles situation may seem quite different [to the FCC] when that proceeding is remanded." Pet. Apps. A at 43a.

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[27] Multi-State contends (M-S Pet. at 12-13) that the court's reversal of the FCC's finding that RKO submitted intentionally false financial reports (Pet. Apps. A at 18a-21a) is inconsistent with previous decisions of the court of appeals sanctioning the FCC's procedure in drawing inferences from the record, and that for its financial misrepresentations to the Commission RKO was properly disqualified in New York as well as in Boston. The cases cited by Multi-State are plainly not in point. Both involve *grants* of applications without a hearing, which are subject to different statutory requirements than *denials*—a distinction correctly perceived by the court below. *See* Pet. Apps. A at 21a n.32; Appendix hereto. Moreover, the court found that here, unlike either of those cases, the agency was confronted with an affidavit that clearly presented unresolved, material questions of fact with regard to the applicant's knowledge and intent. *Id.*

[28] Pet. Apps. A at 41a-42a; *see also id.* at 36a-38a. Any decision that the court of appeals' reliance upon an analogy to summary contempt warrants review in these cases would plainly require a reconsideration of the RKO petition in No. 81-1545. *See* RKO Petition at 11-17; note 21 *supra*.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for the Federal Communications Commission in Opposition, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309 (1976), provides in relevant part:

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * *

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would nor-

mally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * *

Opposition

2

Nos. 81-1928 and 81-1929

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In the Supreme Court of the United States

OCTOBER TERM, 1981

FIDELITY TELEVISION, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MULTI-STATE COMMUNICATIONS, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the court of appeals erred in remanding two broadcast license renewal cases to the Federal Communications Commission for further proceedings, where the Commission had made the outcome of those two cases dependent on the outcome of a third proceeding and the court had upheld the Commission's decision in the third proceeding on the basis of an issue that arose in that proceeding after the first two cases were made subject to its result.

2. Whether the court of appeals erred in reversing a Commission finding on the ground that the Commission had improperly resolved a material factual issue without a hearing (No. 81-1929 only).

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 670 F. 2d 215. The decisions of the Commission are reported at 78 F.C.C.2d 1 (Pet. App. 46a-276a) (WNAC-TV, Boston), 78 F.C.C.2d 355 (Pet. App. 277a-279a) (KHJ-TV, Los Angeles) and 78 F.C.C.2d 357 Pet. App. 280a-282a) (WOR-TV, New York).

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1981 (Pet. App. 283a-284a). Petitions for rehearing were denied on January 18, 1982 (Pet. App. 285a-286a). The petitions for a writ of certiorari were filed on

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[1] References to "Pet. App." are to the appendix to the petition filed in No. 81-1928.

April 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. These cases arise from the Federal Communications Commission's denial of license renewal applications filed by RKO General, Inc., for three television stations in Boston (WNAC-TV), Los Angeles (KHJ-TV), and New York (WOR-TV). The Commission concluded that RKO lacked the requisite qualifications to continue as the licensee of WNAC-TV, Boston (Pet. App. 46a-230a), and then ruled that its decision in the Boston proceeding compelled the termination of RKO's licenses for KHJ-TV and WOR-TV (*id.* at 232a).

a. The first of these cases began in 1965, when petitioner Fidelity Television, Inc. (Fidelity) filed a mutually exclusive application against RKO's application for renewal of its license for KHJ-TV in Los Angeles. A full comparative hearing was initiated, and it included the question whether RKO should be disqualified as a licensee (or at least assessed a comparative demerit) in light of evidence developed in an antitrust suit against RKO for certain reciprocal trade practices. See *RKO General, Inc. (KHJ-TV)*, 44 F.C.C. 2d 123, 124 (1973). The antitrust suit was settled by a consent decree in 1970, so the Commission found it necessary to resolve the issue solely on the licensing proceeding record. *Id.* at 125. In response to requests that the record in the Los Angeles proceeding be reopened to receive further evidence on RKO's past reciprocal trade practices, the Commission made Fidelity a party to the Boston proceeding, which had commenced in 1969 and in which the Commission had designated disqualification and comparative demerit issues respecting both the reciprocal trade practices and RKO's alleged lack of candor respecting those practices; the Commission deferred a final decision on the Los Angeles renewal application pending the outcome of the

Boston proceeding. *Id.* at 125-126. In 1973, however, after Fidelity brought suit to compel the Commission to issue a decision in the Los Angeles proceeding (*id.* at 127), the Commission granted RKO's renewal application, conditioning the grant on the outcome of the Boston proceeding. *Id.* at 137-138.[2]

b. In New York, Multi-State Communications, Inc. challenged RKO's license renewal application for WOR-TV; Multi-State's and RKO's applications were designated for a comparative hearing in 1974. The Commission's designation order specified that the outcome of issues designated against RKO in the Boston proceeding would be res judicata as to RKO in the New York proceeding. *RKO General, Inc. (WOR-TV)*, 46 F.C.C. 2d 246, 248-249 (1974). Those issues were described as involving an alleged broadcast sponsorship identification violation, the reciprocal trade practices, and alleged lack of candor in sworn testimony concerning those practices. *Id.* at 249.

c. On June 6, 1980, the Commission issued its decision in the Boston proceeding, ruling that RKO was not qualified for renewal as the licensee of WNAC-TV. *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980) (Pet. App. 46a-237a). The Commission found RKO disqualified because it had engaged in anticompetitive reciprocal trade practices (*id.* at 119a), because it had filed certain inaccurate financial reports (*id.* at 174a), and because RKO had displayed a "persistent lack of candor with the Commission" during the Boston proceeding (*id.* at 88a, 192a-193a). The basis for the lack of candor finding was RKO's conduct in the Boston proceeding in 1976, after the record there had been closed—in particular, the fact that RKO had responded to another party's charges concerning alleged bribes and other illegal practices on the part of RKO's corporate parent by concealing facts that would tend to support those charges and by asserting in a pleading that the charges had no factual or legal foundation (*id.* at 193a-206a).

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[2] The Commission's decision to grant the application subject to reopening in light of the Boston proceeding was upheld in *Fidelity Television, Inc.* v. *FCC*, 515 F. 2d 684, 698 & n.26 (D.C. Cir.), cert. denied, 423 U.S. 926 (1975).

In companion orders, released on the day of the Boston decision, the Commission held (Pet. App. 278a, 281a) that, "in light of [the] determination" regarding RKO's qualifications in the Boston proceeding and "the interrelationship" between the Boston proceeding and the proceedings in Los Angeles and New York, it was "constrained to conclude that RKO also lacks the requisite qualifications" to remain the licensee of KHJ-TV and WOR-TV.

2. RKO challenged all three disqualification orders in the court of appeals. The court determined that the Commission had intended its conclusions regarding reciprocal trade practices, inaccurate financial reports, and lack of candor to constitute independent grounds for disqualifying RKO as the licensee of WNAC-TV in Boston (Pet. App. 10a). Accordingly, although the court rejected the first two grounds as invalid (*id.* at 10a-21a), it upheld the denial of the WNAC-TV license renewal on the basis of the Commission's finding respecting lack of candor (*id.* at 24a-41a).[3]

The court, however, remanded the Los Angeles and New York proceedings involving KHJ-TV and WOR-TV (Pet. App. 41a-44a). It observed (*id.* at 42a) that the Commission "could not have known, when it conditioned either of these proceedings as it did, that the Boston outcome would turn on a lack of candor issue that had not even been designated in the Boston proceeding"; and it also took note (*ibid.*) of the fact that, in connection with proceedings affecting 13 other broadcast licenses held by RKO, the Commission was not treating the Boston decision as a ground for automatic disqualification, but was, instead, permitting RKO to introduce "mitigating evidence" bearing on its qualifications for retaining the licenses.[4] In remanding the New York and Los Angeles cases, the court did not foreclose the Commission from again reaching the same decision, and it expressly noted (*id.* at 42a-43a) that the Commission's finding "that RKO showed a lack of candor in the Boston proceeding is *res judicata* * * * and not subject to collateral attack" in the proceedings on remand. The court simply directed the Commission (1) to afford RKO's New York and Los Angeles stations "an opportunity to appear directly before the Commission and to argue that they deserve different treatment than RKO's Boston station" (*id.* at 43a-44a) and (2) to provide "a principled explanation for RKO's disqualification as a licensee of [the Los Angeles and New York stations]" if the Commission decides to reaffirm its original orders (*id.* at 44a).

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[3] RKO petitioned this Court for review of the decision insofar as it upheld the denial of the Boston renewal application, and this Court denied the petition. *RKO General, Inc.* v. *FCC*, cert. denied, No. 81-1545 (Apr. 19, 1982).

ARGUMENT

1. Petitioners contend (81-1928 Pet. 8-14; 81-1929 Pet. 8-11) that the decision of the court of appeals to remand the Los Angeles and New York cases for further proceedings and analysis conflicts with *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), and therefore warrants review by this Court. There is, in fact, no such conflict, and given the unusual circumstances giving rise to the Commission's decisions reviewed by the court of appeals,

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[4] *RKO General, Inc.*, 82 F.C.C. 2d 291, appeal pending *sub nom. New South Media Corp.* v. *FCC*, No. 80-2556 (D.C. Cir., filed Dec. 22, 1980).

the question of the propriety of the remand has little precedential significance. Accordingly, the petitions do not meet this Court's standards for review on certiorari.

In *Vermont Yankee*, this Court reversed a decision in which the court of appeals had remanded a rulemaking proceeding to require the agency to employ additional procedural devices that the court deemed desirable and also had remanded a permit-issuance proceeding on the grounds that the agency improperly declined to consider certain alternatives to the permit issuance and that a report filed in the proceeding should have been written in terms making it more understandable to the general public. The Court, noting that the agency had been "in full compliance with all the applicable requirements of the Administrative Procedure Act" (435 U.S. at 549 n.21), held that the court of appeals had improperly invaded the province of the agency by requiring the use of additional procedures beyond those required by statute where there were no unusual circumstances compelling the use of such procedures. 435 U.S. at 524-525. The Court, however, remanded the rulemaking case to the court of appeals for consideration whether the administrative record was adequate to sustain the rule. 435 U.S. at 549.

In the present case the court of appeals did not seek to "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good" (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 549; footnote omitted), nor did it overturn a substantive decision made after an "exhaustive proceeding" because of "a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below" (*id.* at 558). The court simply took note of the fact that, as a result of its own decision invalidating two independent grounds for the denial of RKO's renewal application in the Boston proceeding, the Commission's denial of the two other renewals (New York and Los Angeles) now rested solely on the resolution of an issue that arose in the third proceeding *after* the point at which the New York and Los Angeles decisions had been made dependent on its outcome.[5] In these circumstances, the court not unreasonably directed the Commission to consider those two renewal decisions anew, to provide the New York and Los Angeles stations a chance to show that they should be treated differently from the Boston station, and to supply "a principled explanation for RKO's disqualification as a licensee of those stations" if it again reached that result (Pet. App. 43a-44a). The court expressly noted that "the Commission may give [the candor] finding whatever weight it considers appropriate" (*id.* at 43a), thus permitting the Commission to reaffirm the denials, so long as it relies on an adequate record and adequately explains the reasons for its decision. Moreover, in view of the Commission's own decision not to treat the Boston findings as a ground for automatic disqualification of RKO as the licensee of 13 other broadcasting stations (page 5 & note 4, *supra*), the court was hardly imposing upon the Commission an unusual requirement that had no relationship to the Commission's customary manner of conducting its license renewal proceedings.[6]

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[5] In 1973 and 1974, the years when the final resolution of renewal decisions for, respectively, the Los Angeles station and the New York station, were made dependent on the outcome of the Boston proceeding, RKO's alleged lack of candor with respect to certain trade practices was in question; but the candor issue regarding the concealment of unlawful payments by RKO's parent corporation, which the Commission later concluded was "perhaps of greatest importance" among the three independent bases for its decision (Pet. App. 88a), did not arise until the winter of 1975-1976. (See pages 3-4, *supra*). The Commission upheld the finding that RKO had not displayed a lack of candor respecting the reciprocal trade practices. Pet. App. 253a, Exception No. 157, upholding *RKO General, Inc. (WNAC-TV)*, 78 F.C.C. 2d 147, 336 (1974) (initial decision).

In sum, the decision remanding the New York and Los Angeles cases for further proceedings was a permissible response in the unusual circumstances of this case. The decision raises no unresolved general questions of administrative law, and no other basis for review by this Court is apparent.

2. Petitioner Multi-State contends (81-1929 Pet. 12-14) that the court of appeals erred in reversing the Commission's finding that RKO had submitted financial reports that were knowingly and deliberately inaccurate. It argues that the court's ground for that reversal—the Commission's failure to grant a hearing on the issue of RKO's intent in the face of an affidavit from an RKO official suggesting other explanations for the inaccuracies—conflicts with earlier decisions of the District of Columbia Circuit. The contention is without merit and plainly presents no issue worthy of review, even if it is assumed that the court erred.

The decisions cited by Multi-State stand for the propositions that the Commission may, in granting a license application, rest its decision on inferences drawn from essentially undisputed facts (*Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F. 2d 919, 924 (D.C. Cir. 1973)), and that contradictory allegations and affidavits creating "some possibly unresolved factual issue" do not necessitate a hearing where the data available to the Commission show that there are no "substantial and material questions of fact" barring a decision to grant an application (*Broadcast Enterprises, Inc.* v.

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[6] The court also took note (Pet. App. 43a n.48) of *KFPW Broadcasting Co.*, 47 F.C.C. 2d 1090, 1095-1096 (1974), in which the Commission granted a broadcaster's application for a new station, even though it decided at the same time that the same applicant should be denied renewal of its license for another station on character grounds.

FCC, 390 F. 2d 483, 485 (D.C. Cir. 1968). Since the court concluded that, in this case, the Commission's finding respecting the inaccurate reports was made in the face of an unresolved material factual issue, the court's decision is entirely consistent with the two cited cases.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FIDELITY TELEVISION, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

REPLY BRIEF OF FIDELITY TELEVISION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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FIDELITY TELEVISION, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*

REPLY BRIEF OF FIDELITY TELEVISION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Fidelity Television, Inc., relying on *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978), seeks certiorari on the important question of whether the court of appeals' remand of the Los Angeles proceeding was an improper judicial intrusion upon the authority of an agency to set its own procedures and manage its own docket. The remand stemmed from the court's refusal to credit the Commission's procedural decision that Fidelity was a party to the Boston proceeding for purposes of the issue on which RKO General, Inc., was ultimately disqualified – that is, RKO's "persistent lack of candor with the Commission" beginning with the dissembling pleading of January 1976 in which RKO denounced as "groundless" charges of gross misconduct that were, in fact, true.[1]

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[1] Pet. App. 192a-193a.

The Commission knows that in its decision of June 4, 1980, it ruled that Fidelity was a party to the Boston proceeding for purposes of considering RKO's post-1975 misconduct. Yet, the Commission's brief in opposition appears to acquiesce in the court's assumption that Fidelity was not a party for purposes of that issue. Now, almost two years after its decision, the Commission joins RKO in attributing significance to the fact that the matter of RKO's "persistent lack of candor" in the Boston proceeding arose after the Los Angeles and New York proceedings had been meshed with the Boston proceeding.

That is not the way the Commission viewed the matter below, and that is not the way the Commission viewed the matter in its decision of June 4, 1980. Somewhere between the court of appeals and this Court the Commission has changed its position. The Commission's decision of June 4, 1980, dealt expressly with the question of (a) whether Fidelity was a party to the Boston proceeding for purposes of the candor issue that arose in January 1976 or (b) whether its participation was limited to the reciprocal trade practices and sponsorship identification issues that led to the Commission's 1971 order that first made Fidelity a party to the Boston proceeding. The Commission could not have been more explicit about it. It dealt with the matter squarely in ¶¶ 46-50 of the decision of June 4, 1980.[2] In those paragraphs, the Commission took note of RKO's opposition to the participation of Fidelity and Multi-State "in the current phase of the Boston proceeding." It took note also of the argument that "Fidelity's and Multi-State's interests rest solely on those basic qualifications issues previously designated" and that there was "no reason" for Fidelity and Multi-State to participate with respect to a basic qualifications issue that arose later.

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[2] Pet. App. 80a-83a.

The Commission took note of those arguments, and it rejected them:[3]

> "We disagree . . . . Multi-State and Fidelity must be accorded status as parties to the extent this proceeding concerns RKO's basic qualifications. Both Fidelity and Multi-State have a clear, substantial interest in the outcome of the Boston proceeding. The character issues originally specified against RKO dealt only with sponsorship identification and reciprocal trade practices. However, the same reasoning which led the Commission to allow Fidelity and Multi-State to participate as to those issues applies to the matters under consideration as a result of the SEC investigation, since these matters also bear upon RKO's basic qualifications . . . . Hence, fairness requires that Fidelity and Multi-State have an opportunity to participate in the Boston case to the extent it concerns RKO's qualifications. Our conclusion is buttressed by the court's statement that the Commission's decision in the Boston proceeding 'and the agency's interpretation of it in deciding whether to revoke RKO's license for KHJ will of course constitute an appealable order of the Commission, which may then be appealed by either Fidelity or RKO.'[82]
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> [82] *Fidelity Television, Inc. v. FCC, supra,* 515 F.2d at 693 n. 13 [1975] We recognize that the court did not specifically consider developments subsequent to its decision, including the SEC complaint and preparation of the Special Report. However, the court made it plain that Fidelity had a right to participate in the Boston proceeding to the extent it concerned RKO's basic qualifications."

Despite this express ruling, the Commission has framed the first of the "Questions Presented" in its brief in opposition in a manner that attributes significance to the fact that the disqualifying issue in the Boston case arose after the Los Angeles and New York cases had been made subject to the result in Boston.[4] It is unseemly for the Commission in 1982 to phrase the question in that fashion without disclosing that the Commission in 1980 had considered that fact in its decision and had concluded that Fidelity's participation in the Boston proceeding was not limited to the issues as they existed in 1971 but extended also to RKO's post-1975 misconduct.

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[3] Pet. App. 82a-83a.

The court of appeals concluded that it had to remand the Los Angeles case because the FCC had not yet provided "a principled explanation" for RKO's disqualification as licensee of KHJ-TV.[5] The court reached that conclusion only by ignoring the Commission's procedural ruling making Fidelity a party to the Boston proceeding for purposes of RKO's post-1975 misconduct. As the above quotation shows, Fidelity was, in fact, a party to the Boston proceeding for that purpose, and the Commission's decision of June 4, 1980, gave a principled and reasoned explanation for that procedural action.

The Commission's decision also gave a principled and reasoned explanation for its substantive decision to disqualify RKO in Los Angeles as well as in New York. The two cases had been linked since 1971, and both were ripe for decision. The Commission had before it a full record of RKO's performance in Los Angeles as well as a full record of its performance in Boston. The Commission concluded that the factors compelling disqualification in Boston also compelled disqualification in Los Angeles.[6] It could not rationally have concluded otherwise. An outlaw in Boston is no less an outlaw in Los Angeles.

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[4] Brief in opposition, p. 1; see also p. 7.

[5] Pet. App. 44a.

[6] Pet. App. 232a, 277a-279a.

The basis of the court of appeals' remand of the Los Angeles order was the court's failure to honor the Commission's 1971 procedural order making Fidelity a party to the Boston proceeding and the procedural ruling in its decision of June 4, 1980, holding that Fidelity was a party to the Boston proceeding for purposes of the disqualifying issue. The court's disregard of the Commission's procedural actions was an unwarranted judicial intrusion into the Commission's authority to manage its own docket and a violation of this Court's ruling in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

The Commission's brief in opposition is tantamount to a request by the Commission that it be permitted to adjudicate again what it has already adjudicated in its decision of June 4, 1980 — whether the RKO misconduct found to be disqualifying in Boston is also disqualifying in Los Angeles. Nothing has changed since that decision except the composition of the Commission itself. And that, of course, is not a proper basis for the Commission to seek another opportunity to evaluate RKO's qualifications to be licensee of KHJ-TV. See *American Trucking Associations v. Frisco Transportation Co.*, 358 U.S. 133, 146 (1958).

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